Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

JOHN GEORGE BROWN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

THE PEOPLE
Plaintiff and Respondent
v.
JOHN G. BROWN,
Defendant and Appellant

Crim. No. 22646

SUPREME COURT OF CALIFORNIA

46 Cal. 3d 432; 758 P.2d 1135; 250 Cal. Rptr. 604

Filed: August 25, 1988

SUBSEQUENT HISTORY: Appellant's Petition for a Rehearing was Denied October 13, 1988. Broussard, J., was of the Opinion that the Petition should be Granted.

PRIOR HISTORY: Superior Court of Orange County, No. C44897, Kenneth E. Lae, Judge. DISPOSITION: The judgment of guilt, the finding of a special circumstance, and the penalty judgment are affirmed.

CORE TERMS: juror, aggravating, prosecutor, mitigating, death penalty, penalty phase, sentencer, guilt phase, aggravation, reasonable jury, aggravating factor, peace officer, vi, sentence, appropriate penalty, mitigation, outweigh, assault, mitigating factor, gravity, plur, conc, reasonable-possibility, misled, special circumstance, italics, mitigating evidence, harmless-error, extenuate, reliability

COUNSEL: J. Courtney Shevelson, under appointment by the Supreme Court, for Defendant and Appellant.

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JUDGES: Opinion by Lucas, C. J., with Panelli, Arguelles, Eagleson and Kaufman, JJ., concurring. Separate concurring opinion by Mosk, J. Separate concurring opinion by Kaufman, J., with Panelli, J., concurring. Separate concurring and dissenting opinion by Broussard, J. OPINION BY: LUCAS

OPINION: This is an automatic appeal from a judgment of death under the 1978 death penalty legislation. (Pen. Code, @@ 190-190.5.)[1] We affirm.

I. Facts and Procedure

In June 1980 defendant was a wanted man; he had failed to appear for a jury trial and another criminal hearing, and two bench warrants were issued for his arrest. After telling his former live-in girlfriend he was not going back to jail and did not want to die in prison, defendant bought a gun and changed his name to Gordon Mink.

Meanwhile the Garden Grove police were looking for him. At an evening prepatrol briefing on Saturday, June 7, the police department distributed a flier to all officers. The flier contained defendant's name, photograph, and description; it noted there were outstanding warrants for his arrest, described his car, and listed the address where the car was last seen.

Shortly thereafter, Officer McInerny and his partner, Reserve Officer Henninger, found the described car at an apartment complex. They watched it from their marked patrol car for about 45 minutes before they left to handle other pressing calls. While investigating another incident

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1. All statutory references are to this code.

about 11 o'clock later that night, the two officers again noticed defendant's car -- this time at the Cripple Creek Bar.

They called for assistance, and Garden Grove Officers Reed and Overly quickly arrived. After discussing the flier distributed earlier that evening, all four officers -- all in full uniform -- entered the crowded bar through two separate doors and worked their way to the center of the room.

Defendant, who was sitting in the corner with a group of other "motorcycle-type people," saw the officers enter; a nearby patron heard him say "the pigs are here," as he started for the door. The officers recognized defendant and moved in his direction. At the door, Officer Reed caught up with defendant and put his hand on defendant's shoulder. Before any of the officers could draw his weapon, defendant pulled a gun and fired at least eight times. Two lethal shots hit Officer Reed; three shots gravely wounded Officer Overly; Officer Henninger was seriously wounded; a private citizen, Terezia, suffered permanent and grave injury after being shot between the eyes; and another citizen, McKinney, was shot in the leg.

Defendant fled and hid in some bushes outside the bar. About two hours later, with numerous officers at the scene, he was found crouched in the dirt. As he was brought out of the bushes an officer called out, "Where's the gun?" Defendant stated, "I threw it." His gun, hat and keys were thereafter found nearby.

Defendant was charged with, inter alia, murdering Officer Reed (@ 187) with special circumstances, i.e.,

intentionally killing a peace officer while engaged in the performance of his duties (@ 190.2, subd. (a)(7)).[2]

At trial the People's case disclosed the above events. Additionally, experts testified defendant's fingerprints were found on internal parts of the recovered weapon that could be reached only by disassembling the handle of the gun, and that the weapon found was probably the murder weapon.

Defendant testified in his defense and presented expert witnesses who suggested he may have suffered from diminished capacity because of drug abuse at the time of the incident. Defendant admitted he had suffered a 1970 felony conviction in Florida for "burglary." He detailed his extensive drug abuse history and claimed to have been under the influence of methamphetamines on the night in question and that he remembered nothing of the events in question. In rebuttal, the People established that defendant's blood sample, taken shortly after his arrest, showed no presence of drugs and specifically, the test for methamphetamine was negative. Moreover, numerous officers who dealt with defendant in the four to five hours

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2. In the remaining counts, defendant was charged with (ii) assault with intent to commit murder (@ 217) and (iii) assault with a deadly weapon on a peace officer (@ 245, subd. (b)). (As to these counts it was further alleged defendant intentionally caused great bodily injury to the victim (@ 12022.7).) Defendant was further charged with (iv) a second count of assault with intent to commit murder and (v) assault with a deadly weapon on a peace officer. (As to count (v), it was again alleged defendant intentionally caused great bodily injury.) Finally, defendant was charged in two additional counts (vi & vii) of assault with intent to commit murder. (As to each of these counts, it was again alleged defendant intentionally inflicted great bodily injury on each of the victims.) As to each of the above seven counts, it was alleged defendant used a handgun within the meaning of section 12022.5.

after his arrest testified that although he "stank like a pig" he behaved normally and did not appear to be under the influence of any drug.

The jury found defendant guilty of murdering Officer Reed and found the special circumstances allegation true.[3]

At the penalty trial the People showed that in 1969, defendant tried to run down a police officer in Florida and was convicted of "aggravated battery"; that he brutally blindsided a bar patron during a fight in 1978; that he and two others forced a jail inmate to orally copulate them while in jail in late 1980; that he stole wirecutters from another jail inmate and threatened "if you tell anyone you will get what I gave to that cop"; that he led a food riot at the county jail; and that he made sexual advances toward another prisoner whom he threatened to sodomize. Defendant vigorously cross-examined the prosecution witnesses who related the above testimony, but put on no evidence of his own.

The jury returned a verdict of death. The trial court heard and denied defendant's motions to modify the verdict and for a new trial, and sentenced him to death.[4]

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3. As to the final two counts (ante, fn. 2) the jury found defendant guilty of the lesser included offenses of assault. On all remaining counts defendant was found guilty as charged, and the weapon use and great bodily injury allegations were found true.

4. For the remaining convictions (ante, fn. 3) defendant was sentenced to prison for 10 years and 4 months.

II. Guilt Phase Issues

A. Representative Cross-section Jury

Defendant claims exclusion of some potential jurors for cause in accord with Witherspoon v. Illinois (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] resulted in a jury that did not represent a fair cross-section of the community or, alternatively, excusal of "Witherspoon excludables" denied him a "neutral" jury on the issue of guilt. The first contention was rejected by a majority of this court in People v. Fields (1983) 35 Cal.3d 329, 342-353 [197 Cal.Rptr. 803, 673 P.2d 680] (plur. opn.), 374 (Kaus, J., conc.); see also People v. Balderas (1985) 41 Cal.3d 144, 191 [222 Cal.Rptr. 184, 711 P.2d 480]; People v. Miranda (1987) 44 Cal.3d 57, 78-79 241 Cal.Rptr. 594, 744 P.2d 1127]; Lockhart v. McCree (1986) 476 U.S. 162, 175-176 [90 L.Ed.2d 137, 149, 106 S.Ct. 1758, 1766]. We reject the second claim for the reasons stated in People v. Anderson (1985) 38 Cal.3d 58, 60 [210 Cal.Rptr. 777, 694 P.2d 1149], and McCree, supra, 476 U.S. at pages 175-181 [90 L.Ed.2d at pp. 149-155, 106 S.Ct. at pp. 1766-1770].

B. Use of Mannequin to Illustrate Testimony

Defendant asserts the court abused its discretion in permitting the People to use a mannequin dressed in Officer Reed's full uniform to illustrate the type and placement of wounds received by the victim in order to support their theory that defendant knew when he fired his weapon that Reed was a peace officer. The record shows the court carefully considered and rejected defendant's claim that use of the dressed mannequin was unreasonably prejudicial, noting that the holes with two blood stains on the shirt were scarcely visible, and because the dressed mannequin showed how Reed looked when he

was shot, it was relevant to the charged special circumstance. We conclude use of the mannequin was "a perfectly proper method of introducing highly relevant evidence" (People v. Robillard (1960) 55 Cal.2d 88, 99 [10 Cal.Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]) and that the court's ruling was within its discretion. (People v. Green (1980) 27 Cal.3d 1, 25 [164 Cal.Rptr. 1, 609 P.2d 468]; People v. Stone (1983) 139 Cal.App.3d 216, 224, fn. 2 [188 Cal.Rptr. 493].)

III. Special Circumstance Issues

Section 190.2, factor (a)(7), defines as a special circumstance for which a defendant may be subjected to the death penalty, the intentional killing of a peace officer[5] while the officer was performing his duties and when the defendant "knew or should have known" that such victim was a peace officer engaged in the performance of his duties. The court instructed the jury on this special circumstance pursuant to CALJIC No. 8.81.7: "To find that the special circumstance, referred to in these instructions as murder of a peace officer, is true, each of the following facts must be proved: (1) That the person murdered was a peace officer, and (2) That he was intentionally killed while engaged in the performance of his duties, and (3) That the defendant knew or reasonably should have known that the person killed was a peace officer engaged in the performance of his duties. [¶] For the purposes of these instructions, a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers." (Italics added.)

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5. The statute defines as a "peace officer," persons so defined in section 830.1, which provides "any police officer of a city . . . is a peace officer." (@ 830.1, subd. (a).)

A. Instructional Error

Defendant first argues the court improperly removed an element of the special circumstance from the jury's consideration, and hence denied him due process, by instructing pursuant to the italicized language. We disagree. As instructed, the jury was left to determine all elements of the special circumstance: It had to determine (i) if the victim was a peace officer, (ii) if he was intentionally killed in the performance of his duties, and (iii) if defendant knew or reasonably should have known the victim was a peace officer engaged in the performance of his duties. The challenged final sentence took no element from the jury; it merely instructed the jury on a point of statutory law -- a point not open to dispute -- that a Garden Grove police officer is a peace officer. (@ 7, subd. 8 ["The words 'peace officer' [throughout the Penal Code] signify any one of the officers mentioned in . . . Section 830 (et seq.)"]; @ 830.1, subd. (a) ["Any . . . police officer of a city . . . is a peace officer"].) The jury was left to make all essential factual determinations, including whether the victim was a Garden Grove police officer.[6]

B. Constitutionality of Section 190.2, Subdivision (a)(7)

Defendant next asserts he may not constitutionally be found eligible for the death penalty merely because he "reasonably should have known" (@ 190.2, subd. (a)(7))

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6. People v. Figueroa (1986) 41 Cal.3d. 714 [224 Cal.Rptr. 719, 715 P.2d 680], is distinguishable. We held in Figueroa the court erred in instructing that particular promissory notes at issue in that case were securities as a matter of law. As noted, the court here did not instruct the jury that Officer Reed was a peace officer as a matter of law; it merely instructed pursuant to the unquestionable and clear terms of the relevant statutes that Garden Grove police officers are peace officers.

the victim was a peace officer engaged in the performance of his duties. Instead, he argues, only those who actually know the victim is a peace officer engaged in the performance of his duties may constitutionally be found eligible for the death penalty. Alternatively, he argues the statute is unconstitutionally vague and overbroad.

We addressed and rejected identical claims in People v. Rodriguez (1986) 42 Cal.3d 730, 780-783 [230 Cal.Rptr. 667, 726 P.2d 113]. As explained in Rodriguez, the statute measurably advances both retribution and deterrence goals, and hence satisfies constitutional demands.[7]

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7. Although we recognized in Rodriguez the possibility that nonself-induced "diminished capacity" might preclude application of the special circumstance at issue here (id., at p. 782, fn. 18), we reject the suggestion -- made for the first time at the initial oral argument in this case -- that a defendant's self-induced "diminished capacity" might produce the same result.

Initially, we note that in the related context of section 245, subdivision (b) (assault on one whom the defendant "reasonably should know" is a peace officer engaged in the performance of his duties), it has been implicitly held that due process principles are not violated by such a conviction even if the defendant was voluntarily intoxicated. (People v. Whalen (1973) 33 Cal.App.3d 710, 717-718 [109 Cal.Rptr. 282];People v. Finney (1980) 110 Cal.App.3d 705, 712-714 [168 Cal.Rptr. 80].) Finney, supra, noted: "As a matter of public policy, defendant's voluntarily becoming intoxicated to the extent of his being unable to perceive the identities of uniformed peace officers driving marked patrol cars with lights and sirens operating is sufficiently culpable conduct to warrant criminal liability for the crime of assault with a deadly weapon on a police officer." (110 Cal.App.3d at p. 714; see also Model Pen. Code, @ 2.08, subds. (2), (4) & (5); La Fave & Scott, Criminal Law (1972) @ 45, at p. 346; 2 Wharton's Criminal Law (14th ed. 1979) @ 108, at p. 64 ["the supportive theory [for imposing liability on those whose voluntary intoxication was 'so extreme as to prevent defendant from perceiving the pertinent risk'] is that there is enough 'negligence' involved in voluntarily becoming grossly intoxicated -- thereby precluding the

Additionally, the reasonably should have known" standard is one that jurors should be able to comprehend without amplification.

IV. Penalty Phase Issues

A. Admission of Foreign Felony Convictions

Defendant contends that because he offered to stipulate to his conviction for the 1969 Florida aggravated battery on a police officer (Officer Paulk), the People should have been precluded from allowing the officer to testify about the circumstances of that event under section 190.3, factor (c). Our review of the record discloses the evidence was argued under factor (b), not factor (c). As we recently held in People v. Gates (1987) 43 Cal.3d 1168, 1203 [240 Cal.Rptr. 666, 743 P.2d 301], the People may properly present evidence showing the circumstances of the prior violent criminal activity.

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perception of risks -- to warrant criminal liability."].)

Similarly, we hold the Eighth Amendment is not violated by an affirmative finding on the special circumstance at issue here, even if the defendant suffered self-induced "diminished capacity." Although advancement of the deterrent goal might be questionable with respect to a defendant who -- by reason of self-induced diminished capacity -- has "reduced capacity for considered choice" (Skipper v. South Carolina (1986) 476 U.S. 1, 13 [90 L.Ed.2d 1, 12, 106 S.Ct. 1669, 1675] (Powell, J., conc.); see also People v. Hood (1969) 1 Cal.3d 444, 458 [82 Cal.Rptr. 618, 462 P.2d 370]; cf., Eddings v. Oklahoma (1982) 455 U.S. 104, 115, fn. 11 [71 L.Ed.2d 1, 11, 102 S.Ct. 869]), at least the retributive goal would still be measurably advanced in such cases: The moral opprobrium that attaches to the intentional killing of one whom the defendant should have known was a peace officer performing his duties is not diminished, and society's need for retribution is no less, merely if the reason for the defendant's negligence as to the status of his intentionally killed victim is defendant's self-induced "diminished capacity."

Defendant next urges that evidence of the Florida aggravated battery should not have been allowed because the minimum elements of the foreign felony conviction would not have proved a California felony at the time the felony was committed. He argues that admitting the evidence of the crime at the penalty phase raised "serious problems akin to double jeopardy and denial of speedy trial," by allowing the People to "relitigate the circumstances of the offense to prove some fact which was not an element of the crime." His argument, however, is misplaced. As noted above, the Florida aggravated battery evidence was argued to the jury under section 190.3, factor (b) ("prior criminal activity by the defendant"), not factor (c) ("prior felony conviction" of defendant). We conclude the evidence was properly considered under factor (b). (People v. Melton (1988) 44 Cal.3d 713, 757, fn. 18 [244 Cal.Rptr. 867, 750 P.2d 741].)

Defendant finally notes the jury was instructed to consider, in its sentencing determination, "all of the evidence which has been received during any part of the trial of this case." He argues that this instruction permitted the jury to consider his Florida burglary conviction -- which he had admitted solely for purposes of impeachment at the guilt phase. He asserts this would constitute error because the foreign felony conviction was inadmissible under section 190.3 factor (c), since the minimum elements of the crime would not have proved a California felony at the time the crime was committed.

Our review of the record, however, does not support defendant's claim that the foregoing "catchall" instruction would mislead a reasonable jury on this point. First, the burglary conviction was never mentioned during the penalty phase. Most significantly, defendant neglects to note that the jury was also instructed (at the guilt phase) to consider the burglary evidence for the limited purpose

of impeachment. On this record, we have no reason to suspect the jury would not continue to view the burglary evidence as so limited.

B. Failure to Instruct That Evidence of Other Violent Criminal Acts Must Be Proved Beyond a Reasonable Doubt

In a related argument, defendant contends the court erred in failing to instruct the jury sua sponte that evidence of defendant's prior violent criminal acts (ante, pp. 441-442) could be considered in aggravation only if proved beyond a reasonable doubt. (People v. Robertson (1983) 33 Cal.3d 21, 53-55 [188 Cal.Rptr. 77, 655 P.2d 279] (plur. opn. by Kaus, J.), pp. 60-63 (conc. opn. by Broussard, J.).) As we recently explained in People v. Miranda, supra, 44 Cal.3d 57, we have long held that such an instruction is required at the penalty phase. (Id., at p. 97, and cases cited.) The Attorney General concedes the error, but argues it did not affect the verdict because each of the violent criminal acts was "unmistakably" proved beyond a reasonable doubt.

Before we analyze the effect of the error on the penalty verdict, we note an absence of authority indicating that the failure to give the Robertson "reasonable doubt" instruction, as a condition to the jury's consideration of other-crimes evidence as aggravating circumstances, amounts to federal constitutional error. (See Miranda, supra, 44 Cal.3d at p. 98 [the Robertson "rule is an evidentiary one and not constitutionally mandated"].) We therefore apply our own state law harmless-error standard. (See Barclay v. Florida (1983) 463 U.S. 939, 940, 958 [77 L.Ed.2d 1134, 1138, 1149, 103 S.Ct. 3418]; Zant v. Stephens (1982) 462 U.S. 862, 888-891 [77 L.Ed.2d 235, 256-259, 103 S.Ct. 2733].)

It is undisputed that, when reviewing state-law errors occurring at the guilt phase of a trial, the standard of review is that announced in People v. Watson (1956) 46 Cal.2d 818, 836 [299 P.2d 243], i.e., whether it is "reasonably probable" a result more favorable to the defendant would have been reached had the error not occurred. For over two decades, however, we have recognized a fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination. Accordingly, we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial. (See People v. Hamilton (1963) 60 Cal.2d 105, 136-137 [32 Cal.Rptr. 4, 383 P.2d 412]; People v. Hines (1964) 61 Cal.2d 164, 169 [37 Cal.Rptr. 622, 390 P.2d 398].)

In 1982 Justice Broussard, concurring in People v. Robertson, supra, 33 Cal.3d 21, at page 63, reviewed Hamilton and Hines, and rearticulated the appropriate standard as calling for a determination of whether there is a "reasonable possibility" such an error affected a verdict. A number of subsequent opinions have embraced that standard. (People v. Allen (1986) 42 Cal.3d 1222, 1281 [232 Cal.Rptr. 849, 729 P.2d 115] (plur. opn.); People v. Davenport (1985) 41 Cal.3d 247, 280 [221 Cal.Rptr. 794, 710 P.2d 861] (plur. opn.) & 295 (Broussard, J., conc.); People v. Phillips (1985) 41 Cal.3d 29, 83 [222 Cal.Rptr. 127, 711 P.2d 423] (plur. opn.), 84 (Kaus, J., conc.) & 85-89 (Bird, C. J., conc. & dis.).)

In this and numerous other capital cases, the Attorney General asks us to retreat from the reasonable-possibility standard and adopt the Watson standard for all nonfederal penalty phase error. He asserts that because our "modern" death penalty statutes (i.e., the 1977 and 1978 laws), unlike the earlier statutes,

contain various guidelines to channel a jury's sentencing discretion, we no longer need apply at the penalty phase a standard of review more exacting than Watson's reasonable-probability test. Further, the Attorney General notes that our state Constitution permits reversal of a judgment only on a showing that the error resulted in a "miscarriage of justice" (art. VI, @ 13), and he suggests Watson is the definitive articulation of that constitutional phrase for all types of error, whether at the guilt or penalty phase.

We reject both points. Although it is true that today's death penalty statutes (more than the former statutes) channel and guide the capital jury's sentencing decision, we cannot ignore the United States Supreme Court's mandate that a capital jury must retain and exercise vast discretion different from that possessed by any guilt phase jury. (E.g., Caldwell v. Mississippi (1985) 472 U.S. 320, 329-330 [86 L.Ed.2d 231, 239-240, 105 S.Ct. 2633] (and cases cited), & fn. 2.)

When the "result" under review is the product of a jury's factfinding, the Watson version of the constitutional "miscarriage of justice" provision is an appropriate and workable standard of review. In such situations the reviewing court can determine if the error likely affected the jury's factfinding and hence its guilt-innocence determination. A capital penalty jury, on the other hand, is charged with a responsibility different in kind from such guilt phase decisions: its role is not merely to find facts, but also -- and most important -- to render an individualized, normative determination about the penalty appropriate for the particular defendant -- i.e., whether he should live or die. When the "result" under review is such a normative conclusion based on guided, individualized discretion, the Watson standard of review is simply insufficient to ensure "reliability in the determination that

death is the appropriate punishment in a specific case." Woodson v. North Carolina (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 961, 96 S.Ct. 2978] (plur. opn.); accord, Satterwhite v. Texas (1988) 486 U.S. 249, [100 L.Ed.2d 284, 292-295, 108 S.Ct. 1792, 1796-1798]; Caldwell v. Mississippi, supra, 472 U.S. 320, 329-330 [86 L.Ed.2d 231, 239-240]; Zant v. Stephens, supra, 462 U.S. 862, 884-885 [77 L.Ed.2d 235, 254-255].)

We will therefore abide by the reasonable-possibility test as our articulation of the constitutional "miscarriage of justice" standard when assessing the effect of state-law error at the penalty phase of a capital trial. In deciding whether it is "reasonably possible" that a given error or combination of errors affected a verdict, we will "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker . . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." (Strickland v. Washington (1984) 466 U.S. 668, 695 [80 L.Ed.2d 674, 698, 104 S.Ct. 2052] [discussing "prejudice" component of ineffective counsel claim arising from guilt and penalty phases of trial].) We therefore emphasize that a "mere" or "technical" possibility that an error might have affected a verdict will not trigger reversal. Instead, when faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.

The People argue the Robertson error (ante, at p. 446) would not possibly have affected a reasonable jury's verdict because each of the violent criminal acts was

"unmistakably" proved beyond a reasonable doubt. We agree. Our review of the record reveals that many, if not all, of the incidents were supported by overwhelming evidence of defendant's use of, or threat to use, violence. Indeed, the evidence of prior violent activity offered as an aggravating circumstance was proved so overwhelmingly by direct testimony that defense counsel did not refute it at final argument. Accordingly, we perceive no reasonable possibility that reasonable jurors would have rendered a different verdict had the instructional error discussed above not occurred.

C. Evidence of Other Criminal Conduct

Defendant contends the court erred in admitting aggravating penalty evidence, that was (i) not criminal or (ii) criminal but did not involve the use or threat of force or violence. (@ 190.3, factor (b).) He claims neither the "food riot" incident, the threats of sexual conduct with a jail inmate nor the possession in jail of the stolen wirecutters constitutes criminal conduct, and that reversal is required under People v. Boyd (1985) 38 Cal.3d 762, 774-775 [215 Cal.Rptr. 1, 700 P.2d 782]. The People assert all three incidents involved criminal conduct and at least the threat of violence.[8]

In Boyd, supra, 38 Cal.3d 762, we considered the permissible scope of evidence the prosecutor may introduce pursuant to factors (a) through (k) of section 190.3. We held the jury may consider as evidence in aggravation only that which specifically bears on the

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8. In a related argument, defendant complains that evidence elicited at the guilt phase about his drug and gun possession was erroneously considered by the penalty jury as an aggravating factor. The People correctly assert, however, that the prosecutor made no mention of such facts in his penalty arguments.

factors enumerated in factors (a) through (k), and the prosecutor may not offer additional evidence beyond that delineated in the statutory guidelines. (Id., at p. 773.)

The evidence presented here regarding the food riot, wirecutter incident and sexual misconduct in jail, may have been properly introduced pursuant to section 190.3, factor (b). Assuming arguendo that any of the evidence was improperly admitted, our review of the record does not demonstrate prejudice. As with the Robertson error discussed above, we are aware of no authority indicating that such assumed error amounts to a federal constitutional violation; accordingly, we apply our state-law penalty phase harmless-error test. We note that the properly admitted aggravating evidence in this case -- specifically, the circumstances of the crime (@ 190.3, factor (a)) -- was simply overwhelming. On this record we conclude it is not reasonably possible that a reasonable jury would have rendered a different verdict had the challenged evidence not been admitted.

D. Former CALJIC Nos. 8.84.1 and 8.84.2

Defendant observes: (i) the jury was instructed pursuant to the complete version of former CALJIC No. 8.84.1 on the factors it was to consider in determining defendant's penalty and it was not given the "expanded factor (k)" instruction subsequently prescribed in People v. Easley (1983) 34 Cal.3d 858; 196 Cal.Rptr. 309, 671 P.2d 813, nor was it otherwise instructed that it might consider "sympathy" factors favoring defendant; and (ii) the jury was instructed pursuant to former CALJIC No. 8.84.2, that it was to impose a sentence of death if it found aggravating circumstances outweighed mitigating circumstances, and it was not given further instructional clarification as to the scope of its discretion pursuant to People v. Brown (1985) 40 Cal.3d 512, 544 [220 Cal.Rptr.

637, 709 P.2d 440], footnote 17, reversed on another ground sub nom. California v. Brown (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].

We noted in People v. Easley, supra, 34 Cal.3d 858, that section 190.3, factor (k) (which is reproduced in former CALJIC No. 8.84.1) speaks only of a "circumstance which extenuates the gravity of the crime." In order to better serve constitutional concerns we imposed the prospective requirement that "trial courts -- in instructing on the factor embodied in section 190.3, [factor] (k) -- should inform the jury that it may consider as a mitigating factor 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (34 Cal.3d 858, 878, fn. 10.)

Similarly, as we stated in Allen, "we explained in People v. Brown, supra, [40 Cal.3d 512,] that the statute's 'weighing process' described in former CALJIC No. 8.84.2, is the method by which 'the jury . . . determines under the relevant evidence which penalty is appropriate in a particular case.' [Citation.] Our concern in Brown was that the unadorned statutory instruction might in two interrelated ways lead the jury to misapprehend its discretion and responsibility. [¶] First, we pointed out that the jury might be confused about the nature of the weighing process. As we observed: '[The] word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale" or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each

and all of the factors he is permitted to consider.' [Citation.] [¶] Second, we were concerned in Brown that the unadorned instruction's phrase, 'the trier of fact . . . shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances' (italics added), could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose. Although the quoted phrase could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances, we concluded in Brown that the statute was not intended to, and should not, be interpreted in that fashion. Instead we stated: 'By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the weighing process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.' [Citation.]" Allen, supra, 42 Cal.3d 1222, 1276-1277.)

Although in Brown we again called for clarifying instructions in future cases, we stated we would examine each earlier case posing Easley and Brown defects "on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." (Brown, supra, 40 Cal.3d at p. 544, fn. 17.)

Undertaking such an inquiry here, we conclude that a reasonable jury would not have been misled in either respect, and hence there was no factor (k) or Brown error.

1. Factor (k)

Although defendant presented no formal evidence at the penalty phase, the jury was instructed to consider all the evidence introduced at the guilt phase, and that evidence included the testimony supporting defendant's diminished capacity defense. The jury was, of course, free to consider such evidence as a mitigating factor under former CALJIC No. 8.84.1, factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, or the effects of intoxication"). Additionally, the jury was free to consider the evidence of defendant's history of drug abuse, and his history generally, as a mitigating factor under factor (k).

Significantly, the prosecutor said nothing to limit the jury's consideration of mitigating evidence under factor (k). He merely argued that factor (k) "[is] a catch-all and it is any other circumstance which . . . extenuates the gravity of the crime even though it is not a legal excuse for the crime. [¶] I can't think of anything that fits in there, anything that extenuates the gravity of this crime. There can be nothing that extenuates the gravity of this crime."

In context, we believe the prosecutor's comment would reasonably be understood not as telling the jury to ignore any of defendant's mitigating character evidence, but rather that, in the prosecutor's view, nothing presented to the jury in mitigation outweighed the aggravating

circumstances of this particular crime. (See Allen, supra, 42 Cal.3d at p. 1276.)

2. Brown

Initially, we are satisfied that the jury was not misled about the nature of the "weighing" process it was required to perform under the statutory instructions. At the beginning of his argument, the prosecutor told the jury it was required to "weigh" the factors to determine if the aggravating or the mitigating factors were "heavier," and that it was up to the jury to decide if the aggravating factors outweighed those in mitigation. These comments, we believe, would reasonably have been understood by the jury as indicating its discretion to decide for itself what "value" to attach to the various factors. It is true that the prosecutor strayed from that approach at the conclusion of his argument by telling the jury, "if you add those factors up" and the aggravating factors prevail, "that's a case where the death penalty is the only appropriate penalty." Viewed in context, however, we do not believe this isolated comment would reasonably have been interpreted as canceling the prosecutor's previous, correct description of the weighing process.

In any event, even if we were to assume the prosecutor's final comment left the jury with ambiguous directions on its weighing task, we believe any perceived ambiguity was removed by defense counsel's argument. He forcefully told the jury: "Now, maybe some of you might think that, well, 'I will go down the list and . . . just add up and say, well, we have seven aggravating and maybe three or two mitigating and say well that, that doesn't do it. I have more aggravating than mitigating,' and bring back the death penalty.

Each one of those things, each one of those items are not equally weighed. You can say, well, one of the mitigating factors I can consider is [factor (h)] . . . . [¶] [You] can give that a lot of weight. You are not limited to say you will give equal weight as to the other factors. . . . [¶] I don't want you to get the impression that you have to give all those factors equal weight. It is up to you how much weight you want to give. . . . [¶] I just want to make that point clear to make sure you know what you can do and what you cannot do. [¶] See, we can't restrict you as to what weight you want to give each of those items . . . . It is up to you to give what weight you want to give."

Given this detailed explanation, we are confident that a reasonable jury would have understood its discretion to assign whatever weight it deemed appropriate to the various aggravating and mitigating factors.

We turn now to the "second aspect" of our concern in Brown, namely, whether the jury reasonably understood its sole responsibility to decide, based on the weighing process, whether death is the "appropriate" penalty in a given case.

The prosecutor may well have given the jury conflicting signals about its role. At the close of his argument, he told the jury, "[was] it Harry Truman that said the buck stops right here with you folks, and . . . the voters are the ones that put this law into effect and you all said you'd follow it." On the other hand, at the start of his argument he told the jury that if the aggravating factors "outweighed" or were "heavier" than the mitigating factors, "the penalty to be imposed" is the death penalty. Similarly, at the close of his argument he told the jury, "the law says . . . if the aggravating outweigh the mitigating, that's a case where the death penalty is the

only appropriate penalty." We doubt, however, that these latter comments would reasonably be understood as divesting the jury of its power and responsibility to determine the "appropriateness" of defendant's sentence in the context of its weighing task. Nor do we believe that any other aspect of the prosecutor's argument, taken as a whole, conveyed a similar improper message.[9]

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9. At closing argument, the prosecutor, while discussing the "weighing process," returned the jury's attention to his voir dire discussion with each juror. Because the prosecutor took this approach, we have reviewed the voir dire exchanges between the prosecutor and each selected juror to determine whether that discussion at that stage might have infected the jury's understanding of its "appropriateness determination" task at penalty trial. We conclude it is not likely the jury was misled.

There is one exchange that is somewhat troublesome. As to one juror, the prosecutor stated, "if you determine that the aggravating factors are just a little bit heavier than the mitigating factors, then the law requires you to return a death penalty verdict. [¶] Do you have any quarrel with that? [¶] A: No. [¶] Q: You can follow that law? [¶] A: Yes." Later, after the prosecutor explained that the sentencing decision would be based on certain specified aggravating and mitigating factors, the following exchange occurred: "Q. And, you can look at yourself and say, 'okay,' . . . 'I feel these aggravating factors outweigh the mitigating factors, but I am still kind of on the fence about the death penalty. I am not sure about the death penalty, but in my mind I feel the aggravation outweighs the mitigation.' [¶] You will comply with the law and return a death penalty verdict? [¶] A: Yes, if that's how I feel. [¶] If I feel one outweighs the other."

The prosecutor's questions at this point did not accurately describe a juror's sentencing discretion or responsibility. (Allen, supra, 42 Cal.3d at p. 1277, 2d par.) But additional aspects of this juror's voir dire persuade us that the juror properly understood that she was to determine whether, in her view, death was the appropriate penalty. The trial court, in initially describing the jury's task at the penalty phase to this juror, informed her that "you will utilize what

Again, any doubt we might have had about whether the prosecutor's argument served to properly inform the jury about its duty to decide "appropriateness" in the context of its weighing function, is removed by examining defense counsel's arguments on this point. The thesis of counsel's presentation was that the jury had the authority and the responsibility to decide whether defendant deserved to live or die; the theme of his argument was that the jury should exercise that discretion in favor of a sentence of life in prison without the possibility of parole. He reminded the jury that each juror had promised at voir dire not "automatically" to impose the death penalty. "And, we went through the question of when you would impose the death penalty and when you would not impose the death penalty. . . . [¶] [All] of you stated that only in [a] certain type of a murder case [would you] impose the death penalty. . . . So I asked . . . you under what . . . conditions would you impose the death penalty. And, all of you said that it must be a crime that was so horrible." He reminded the jury that they had "agreed" that the death penalty "should be imposed" for crimes like " the

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you hear in the penalty phase together with what you heard in the guilt phase in making a determination as to what the appropriate penalty would be in this particular case . . . ." And the following exchange between defense counsel and the juror is also instructive: "Q. [Defense counsel]: From your answers, I [take it that you] . . . do believe in the death penalty? A: When it's necessary. Q. But not in all murder cases? A: No, just when it's necessary. Q. In other words, you can examine the facts and evidence? A. Yes. Q: [If] [you] feel in your mind this is a type you should impose the death penalty, you'd do it? A: Right."

Viewing the record as a whole, we believe the juror understood that she would retain discretion to determine whether death was the appropriate penalty in this case. In any event, we strongly question whether any such assumed "misdirection" of a single juror during sequestered voir dire could reasonably be said to have infected the jury's penalty phase sentence selection.

Manson case," and reiterated that each juror was chosen "because I felt you were going to give this case a lot of consideration." He then stated: "Now, you have a choice," and spoke about whether death or life in prison was the "worst punishment." He again emphasized that the jury would be making a discretionary decision about appropriateness ("So you have two choices"), proceeded to argue the relative weight of the aggravating and mitigating factors as discussed above and argued against the death penalty for this defendant. In light of all this, we are confident that no reasonable jury would have been misled about its sole discretion to decide, based on its weighing exercise, whether death was the "appropriate" punishment for this defendant.

E. Prosecutorial Argument

1. Davenport

The prosecutor in closing argument told the jury that the absence of various statutory factors tending toward mitigation should be considered as aggravating factors in the jury's weighing process.[10] Reviewing a similar

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10. As to section 190.3, factor (d) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"), the prosecutor told the jury: "This defendant doesn't have that excuse. He has no mental or emotional disturbance other than the fact that he just is a sociopath, an antisocial and likes to hurt people. So in this particular case that's an aggravating factor." As to factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"), he told the jury: "Obviously in this case there is no way that Don Reed participated [in] or consented to the homicidal type conduct. So in this case it is an aggravating factor." As to factor (f) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"), he stated: "Can we in

argument in Davenport, supra, 41 Cal.3d 247, 288-289, the plurality reasoned: "the statutory instruction that the trier of fact consider the factors 'if relevant' seems to contemplate that not all factors will be relevant in all cases and further that a factor which is not relevant to the evidence in a particular case should be disregarded." (Id., at p. 289.) A contrary interpretation, the plurality held, would make "[several] of the statutory mitigating factors . . . [that are] particularly unlikely to be present in a given

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the wildest stretch of our imagination believe that the defendant felt morally justified killing Don Reed? Absolutely not. It is ridiculous to even suggest this. This is an aggravating factor." As to factor (g) ("Whether or not defendant acted under extreme duress or under the substantial domination of another person"), he maintained: "Did someone force the defendant? Was the defendant under some type of forceful duress to kill Don Reed? Absolutely not. Did someone dominate the defendant and was kind of the mastermind and had the defendant kill Don Reed? Absolutely not. [¶] This is an aggravating factor." As to factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication"), the prosecutor noted that the defense was based on such a contention, but argued the evidence did not establish such "diminished capacity," and stated "[so] I'd submit to you that is an aggravating factor." As to factor (j) ("The age of the defendant at the time of the crime") the prosecutor maintained that defendant's age at the time of trial -- 34 -- "to me would be an aggravating type of factor. It's more aggravating than mitigating." Finally, as to factor (i) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor") the prosecutor argued: "The sole cause of the death of Don Reed at this point is this defendant. No way is his participation minor. He wasn't an accomplice in anything. He was the original and the only actor, so that's an aggravating factor. There's no question about that." In his summation, the prosecutor told the jury that "each of those factors" -- apparently, even the alleged absence of mitigating evidence under factor (k) ("Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime") -- "is an aggravating factor . . . ."

case . . . aggravating circumstances automatically applicable to most murders." (Ibid.) The plurality concluded prosecutorial argument like that made here "is likely to confuse the jury as to the meaning of 'aggravation' and 'mitigation' under the statute and is therefore improper under section 190.3. It should not in the future be permitted." (Id., at p. 290.) We have recently embraced the Davenport plurality's reasoning in Rodriguez, supra, 42 Cal.3d at pages 789-790 (see also People v. Ghent (1987) 43 Cal.3d 739, 775-776 [239 Cal.Rptr. 82, 739 P.2d 1250]).

Although the prosecutor's argument here seems contrary to Davenport, we do not consider the prosecutor's argument to be reversible prosecutorial misconduct, because a timely objection and admonition could have cured any harm. (Rodriguez, supra, 42 Cal.3d at p. 790; Allen, supra, 42 Cal.3d at p. 1284; Miranda, supra, 44 Cal.3d at p. 108 & fn. 30; People v. Green (1980) 27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].) In any event, we cannot conclude the prosecutor's argument prejudiced the jury's sentencing decision. As with the Robertson and asserted Boyd errors discussed above, we are aware of no authority indicating that prosecutorial argument contrary to Davenport amounts to a federal constitutional violation. Consequently, we apply our state-law penalty phase standard of review. First, as we explain above, on this record a reasonable jury would not have been misled about the nature of its weighing process. Second, we note the jury was instructed to consider the listed factors only "if relevant"; thus, we believe a reasonable jury would have understood that it was allowed to give to those factors whatever little weight they deserved. Given this, and in view of the overwhelming nature of the properly introduced aggravating evidence, we conclude it is not reasonably possible that the prosecutor's unobjected-to mischaracterization of the

aggravating circumstances would have influenced a reasonable jury's sentencing decision.

2. Age as an Aggravating Factor

During closing argument, the prosecutor told the jury that defendant's age at the time of the trial -- 34 -- showed he was "old enough to know better" and that his age was therefore, in the prosecutor's opinion, "more aggravating than mitigating." (Ante, fn. 9.) Defendant asserts this argument was improper, but we cannot agree.

As we recently held in People v. Lucky (1988) 45 Cal.3d 259 [247 Cal.Rptr. 1, 753 P.2d 1052], "It is true that 'mere chronological age . . . should not of itself be deemed an aggravating factor.' (Rodriguez, supra, 42 Cal.3d at p. 789, italics added and deleted; accord, Allen, supra, 42 Cal.3d at pp. 1283-1284 (lead opn. of Grodin, J.); Ghent, supra, 43 Cal.3d at pp. 775-776 [. . .].) By the same token, mere chronological age of itself should not be deemed a mitigating factor. Age alone is plainly 'a factor over which one can exercise no control' (Rodriguez, supra, at p. 789) and as such is not relevant to the issue of penalty. This is the core of the lesson that Rodriguez, Allen, and Ghent teach. [¶] In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (Lucky, supra, 45 Cal.3d at p. 302.) Under the analysis set forth above, the prosecutor's comments were proper.

F. Failure to Edit CALJIC No. 8.84.1

Defendant notes the court instructed the jury pursuant to the entire statutory list of aggravating and

mitigating factors of former CALJIC No. 8.84.1 without deleting those factors which were assertedly inapplicable under the evidence. As we have recently made clear in People v. Ghent, supra, 43 Cal.3d 739, 776-777 (1977 law), and People v. Miranda, supra, 44 Cal.3d 57, 104-105 (1978 law), this is not error.

G. Consideration of Factors (a), (b) and (c)

The jury was instructed, pursuant to CALJIC No. 8.84.1 (see also @ 190.3, factors (a), (b) and (c)), to consider for purposes of determining penalty, "(a) [the] circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . ."; "(b) [the] presence or absence of criminal activity by the defendant which involved the use or attempted use of threat or violence" and "(c) [the] presence or absence of any prior felony conviction . . . ." Defendant claims that in failing to modify the above instruction the trial court impermissibly allowed the jury to "double count" the circumstances of the current crime (which included the assaults against the other police officers and two civilians at the Cripple Creek Bar) as aggravating factors under both factors (a) and (b).

We recently held in People v. Miranda, supra, 44 Cal.3d at pages 105-106, that section 190.3 should not be interpreted to allow the jury to consider the circumstances of the crime as two separate aggravating factors. As in Miranda, however, we must conclude that no reasonable jury would have been so misled here. First, we doubt a reasonable jury would understand the instructions as calling for such an interpretation. Second, the prosecutor did not even suggest the jury should consider the circumstances of the crime under factor (b). We therefore find no error.

Defendant also suggests the instructions allowed the jury to "double count" the Florida aggravated assault under both factors (b) and (c). As previously noted, however, the record discloses the evidence was argued only under factor (b). We therefore find no error.

H. Extreme Mental or Emotional Disturbance as a Mitigating Factor

Section 190.3, factor (d) requires the jury to consider "whether or not the offense was committed while defendant was under the influence of extreme mental or emotional disturbance." The jury was so instructed here. Defendant claims the instruction unduly limited the type of mental or emotional disturbance the jury was allowed to consider in rendering its sentencing decision. We recently considered and rejected an identical argument under the 1977 death penalty law in People v. Ghent, supra, 43 Cal.3d 739, 776.

As the People observe, the jury was additionally instructed to consider whether or not at the time of the offense defendant's ability to appreciate the criminality of his conduct "was impaired as a result of mental disease or defect or the effects of intoxication." (@ 190.3, factor (h).) Furthermore, as we noted above, the jury was also instructed to consider "[any] other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (@ 190.3, factor (k).) We believe the instructions and counsel's arguments thereon (ante, pp. 451-452), viewed as a whole, sufficiently informed the penalty jury it could consider a mental condition of the defendant which, though not characterized as extreme, would potentially mitigate the circumstances of the offense.

In a related argument, defendant complains the instruction given pursuant to section 190.3, factor (h)

failed to distinguish the "substantially reduced mental capacity" instruction offered at the guilt phase as to defendant's drug intoxication.[11] He argues the similarity between the two instructions may have misled the jury into believing its guilt verdict foreclosed consideration at the penalty phase of evidence of impaired capacity that failed to establish a defense to the charges.

Again, based on the instructions and arguments thereon, we believe the jury was adequately informed that it could consider intoxication as mitigating evidence even though it did not create a reasonable doubt as to guilt. Accordingly, we find no error.

I. Timely Notice of Penalty Phase Evidence

Section 190.3 provides in part, "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." Defendant argues, for the first time on appeal, that certain penalty phase evidence in aggravation was erroneously admitted because the People failed to give him timely and adequate notice of what evidence the prosecutor intended to introduce at the penalty phase. Defendant asserts the statutory notice requirement applies to the trial (not the penalty phase), which, he argues, commences with the selection of jurors.

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11. At the guilt phase, the court instructed pursuant to CALJIC No. 8.77 (1979 revision). The first paragraph of the instruction provides: "If you find from the evidence that at the time the alleged crime was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect, intoxication, or any other cause, you must consider what effect, if any, this diminished capacity had on the defendant's ability to form any of the specific mental states that are essential elements of murder and voluntary manslaughter." (Italics added.)

In mid-December 1980, over three months before the guilt trial began, the People filed their notice of evidence to be introduced in aggravation. The notice listed 20 incidents that the People intended to admit as evidence in aggravation at the penalty phase. Two of the listed incidents (the aggravated battery on Officer Paulk in Florida in 1970, and the assault with a deadly weapon in California in 1978) were actually presented under section 190.3, factor (b) at the penalty phase.

In late March 1982, one day after the case was called for trial, but ten days before the jury was sworn, the People filed an amended notice of evidence to be introduced in aggravation. The People listed three items of evidence that were presented at the penalty phase: (i) circumstances involving the forcible oral copulation and assault of a fellow inmate in late 1980; (ii) evidence of defendant's involvement in a robbery (wirecutter incident) in the Orange County jail in 1981; and, (iii) evidence of defendant's participation in a food riot in the Orange County jail in 1981.

Defendant avers he was prejudiced by the admission of the last three items because he did not have a fair opportunity to investigate and plan trial strategy to meet that evidence. He further claims that rejection of the listed evidence at the penalty phase "would have dramatically altered the posture of the case" to his advantage. He does not explain, however, how the proffered evidence affected his investigation and trial strategy. Furthermore, he fails to suggest how the "posture of the case" would have been "dramatically altered" had he been given more time before trial to contemplate the kind of criminal activity the People included in their amended notice. Indeed, we note that although the amount of the postguilt aggravating evidence was expanded by the three items of evidence listed in the

amended notice, the nature of the evidence remained the same. Thus, we conclude that the statutory requirement of notice within a reasonable time was met here. Defendant was given the amended notice 10 days before the actual trial began, and he neither objected to the notice nor requested a continuance to investigate the evidentiary circumstances in the trial court. In any event, any error that may have occurred could not have been prejudicial on the facts of this case.

J. Guilt Phase Instructions Applicable to Penalty Phase

As defendant notes, the court failed to instruct the jury as to which guilt phase instructions applied in the penalty phase. Defendant asserts that if the jury ignored all guilt phase instructions in its penalty deliberations, it was left without instruction on how it should evaluate witness credibility, admissions by the defendant, and expert or lay opinion testimony. Conversely, he contends, if the jury assumed that all guilt phase instructions should be considered at the penalty phase, he was denied a fair penalty determination because the jury was instructed at the guilt phase not to be influenced by pity or governed by sentiment or sympathy for defendant and to disregard the consequences of its decision. (CALJIC No. 1.00.)

Assuming the first scenario, we question whether there was error. Having heard nothing to contradict the earlier instructions on evaluating witnesses' credibility, etc., we believe a reasonable jury would correctly assume those "generic" instructions continued to apply. (See People v. Gates (1987) 43 Cal.3d 1168, 1209 [240 Cal.Rptr. 666, 743 P.2d 301].) In any event, even if error occurred, we cannot imagine this amounted to reversible prejudice in this case.

Assuming the second scenario, we again question whether error occurred. As the United States Supreme Court has recently made clear, giving the "no sympathy" instruction at the penalty phase is not itself error. (California v. Brown, supra, 479 U.S. 538, 542-543 (plur. opn. by Rehnquist, C. J.) & 544-546 (conc. opn. by O'Connor, J.) 93 L.Ed.2d 934, 940-943, 107 S.Ct. 837, 839-841 & 841-842].) Instead, we must review the whole record to determine "whether the jury was adequately informed of its obligation to consider all of the mitigating evidence introduced by the [defendant]." (Id., at p. 546 [93 L.Ed.2d at p. 943, 107 S.Ct. at p. 842] (conc. opn. by O'Connor, J.).) Here, the "no sympathy" instruction was not given at the penalty phase. Moreover, as noted above, we conclude the jury was otherwise properly informed of its obligation to consider all of defendant's mitigating evidence (ante, pp. 451-452). In this situation we find no "legitimate basis" (479 U.S. at p. 546 [93 L.Ed.2d at p. 943, 107 S.Ct. at p. 842] (conc. opn. by O'Connor, J.)) for believing the jury was misled in the manner hypothesized by defendant. (See People v. Miranda, supra, 44 Cal.3d 57, 102; Gates, supra, 43 Cal.3d at p. 1209.)

K. Instructions on Substitution of Alternate Juror

Before the penalty trial, it became necessary to substitute one juror with an alternate. Defendant argues the court failed to follow the mandate of People v. Collins (1976) 17 Cal.3d 687, 694 [131 Cal.Rptr. 782, 552 P.2d 742], because it did not instruct the jurors to "disregard the earlier deliberations as if they had not been had."

Collins requires the trial court to instruct the jurors to begin deliberations anew if substitution becomes necessary after the jury has begun its deliberations. (17 Cal.3d at p. 694) Here, the alternate juror joined the

panel of jurors before the penalty trial began, and hence, before the penalty phase deliberations began. Under these circumstances, the Collins instruction was not necessary to insure the preservation of the "essential elements of trial by jury. . . ." (Id., at p. 692.)

L. Marsden Motion

After the jury had returned its penalty verdict, defendant filed a motion in propria persona claiming he had a conflict of interest with his court-appointed counsel and requesting substitution of another appointed counsel. He now complains the court erred in allegedly ignoring his request for substitution of counsel. Specifically, he asserts the court's failure to grant his motion violated his Sixth Amendment right to effective assistance of counsel. (People v. Marsden (1970) 2 Cal.3d 118, 123 [84 Cal.Rptr. 156, 465 P.2d 44]; Cal. Const., art. I, @ 15; U.S. Const., Amend. VI.)

We find defendant's argument devoid of merit. We note that defendant has not argued on appeal that trial counsel was incompetent. Thus, we can infer his Marsden motion lacked substance because ineffective assistance of counsel is the foundation which supports the Marsden rule. (Marsden, supra, at 2 Cal.3d p. 123.) In any event, after careful review of the record, we conclude defendant's motion fails to show any significant impairment of his right to counsel. (Ibid.)

M. Constitutionality of 1978 Death Penalty Law

Defendant contends the 1978 death penalty law violates the Eighth Amendment's proscription of "arbitrary" sentencing procedures because it does not provide adequate safeguards to ensure against arbitrary death judgments. He also argues the 1978 law is

unconstitutional in various other respects. Each of his federal constitutional arguments has been considered and rejected in recent opinions. (See, e.g., Rodriguez, supra, 42 Cal.3d 730, 777-779.)

Defendant further claims his sentence is unconstitutionally disproportionate under article I, section 17 of the California Constitution. (People v. Dillon (1983) 34 Cal.3d 441, 449-484 [194 Cal.Rptr. 390, 668 P.2d 697]; In re Lynch (1972) 8 Cal.3d 410, 423-429 [105 Cal.Rptr. 217, 503 P.2d 921].) In view of the facts set out ante, at pages 440-441, it is impossible for defendant to show his sentence is disproportionate to his individual culpability. Nor can defendant claim his sentence otherwise violates the Dillon/Lynch requirements. (See Allen, supra, 42 Cal.3d 1222, 1285-1286.)

In a related argument, defendant contends he was denied equal protection because he did not receive "comparative sentence review" pursuant to the "disparate sentence" statute, section 1170, subdivision (f). We rejected the identical claim in Allen, supra, 42 Cal.3d 1222, at pages 1286-1288.

N. Application for Modification of Death Judgment Under Section 190.4, Subdivision (e)

In every case in which a death penalty is returned, section 190.4, subdivision (e) provides the trial court must "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances . . . and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reason for his findings." (@ 190.4, subd. (e).)

Defendant urges the court committed three errors in its statutory modification ruling. First, he notes the court considered the absence of mitigating factors as aggravating factors. Second, he argues the court's consideration of the Florida aggravated battery as evidence of other criminal activity in its modification ruling was improper because the Florida crime was not a felony in California at the time it was committed. Finally, he contends the court demonstrated an unconstitutionally narrow interpretation of factor (k) when it stated it did not believe defendant's past abuse of drugs "extenuated the gravity of the crime."

We earlier rejected defendant's similar assertions in our review of the jury's penalty determination. Although we have not yet determined the applicable prejudicial error standard for reviewing trial court error in ruling on the statutory motion for modification of sentence, the error under Davenport, supra, 41 Cal.3d 247, was harmless under any standard. Further, as we have explained, the court's consideration of the aggravated battery as an aggravating factor was proper under section 190.3, factor (b). Finally, even assuming the court failed to consider defendant's past drug abuse as a mitigating factor, we cannot, on the facts of this case, conclude the error prejudiced defendant.

O. Cumulative Error

Defendant insists that the above discussed errors (ante, pp. 446, 449 & 455-456), viewed cumulatively, require reversal. We conclude, however, that there is no reasonable possibility that these errors, singly or in combination, affected the jury's verdict.

V. Conclusion

The judgment of guilt, the finding of a special circumstance, and the penalty judgment are affirmed.

CONCUR BY: MOSK; KAUFMAN; BROUSSARD (In Part)

CONCUR: MOSK, J. I concur in the opinion of the court and especially in its reaffirmation of the so-called "reasonable-possibility" test as the appropriate standard of review for errors in the penalty phase of a capital case.

I write separately to explain why I feel compelled to adhere to that test.

In People v. Hamilton (1963) 60 Cal.2d 105 [32 Cal.Rptr. 4, 383 P.2d 412], this court construed the mandate of article VI, section 4 1/2 of the state Constitution -- the predecessor of current article VI, section 13 -- in the context of penalty phase error. In so doing, it effectively adopted what is now termed the reasonable-possibility test. The relevant discussion is as follows.

"Article VI, section 4 1/2 of the Constitution provides that a reversal shall not follow because of error 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' In People v. Watson (1956) 46 Cal.2d 818, 836 [299 P.2d 243], not a death penalty case, the court after an exhaustive analysis said as to the question of guilt, '. . . the test generally applicable may be stated as follows: That a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably

probable that a result more favorable to the appealing party would have been reached in the absence of the error.' That test has many times been restated. As to the issue of guilt, that test is quite clear in its application. The appellate court is required to read the record, determine what errors were committed, and then try to tell from that record whether, had those errors not occurred 'it is reasonably probable that a result more favorable to the appealing party would have been reached.' . . .

"But in deciding the effect of the errors on the penalty phase of the trial the problem is not so simple. Here, according to the mandate of section 190.1 of the Penal Code the 'determination of the penalty of life imprisonment or death shall be in the discretion' of the jury. There are no basic guide lines to assist the jury in coming to that determination. On the trial of the guilt issue the jury is bound by rules of law laid down by the court in its instructions. But on the penalty phase of the trial there are no such guide lines. The jury does not have to find ameliorating circumstances to impose life imprisonment, nor need it find aggravation to impose the death penalty. The choice between the two rests in the absolute discretion of the jury. Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where . . . the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, . . . the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different

result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. . . . This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial." (60 Cal.2d at pp. 135-137.)

Although Hamilton was decided more than 20 years ago, its teaching, as I shall explain, is in accord with the principles of present-day Eighth Amendment jurisprudence and hence has lost none of its persuasive force.

I begin with what should be common ground. In the formulation of a standard of prejudice, "Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors . . . ." (Kotteakos v. United States (1946) 328 U.S. 750, 762 [90 L.Ed. 1557, 1565, 66 S.Ct. 1239].)

As the United States Supreme Court has repeatedly emphasized, "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (Woodson v. North Carolina (1976) 428 U.S. 280, 305 49 L.Ed.2d 944, 961, 96 S.Ct. 2978] (opn. of Stewart, Powell, and Stevens, JJ.); accord, Caldwell v. Mississippi (1985) 472 U.S. 320, 329 [86 L.Ed.2d 231,

239-240, 105 S.Ct. 2633]; California v. Ramos (1983) 463 U.S. 992, 998-999 & fn. 9 [77 L.Ed.2d 1171, 1178-1179, 103 S.Ct. 3446], citing cases; Lockett v. Ohio (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954] (plur. opn. by Burger, C.J.).)

In view of the qualitative difference between life and death and the consequent need for greater reliability in the determination of penalty in a capital trial, both this court and the United States Supreme Court have imposed a complex system of safeguards, peculiar to the penalty determination, in order to heighten the reliability of the outcome and thereby minimize the risk that a person may be sentenced to death even though he ought not to be. (E.g., McCleskey v. Kemp (1987) 481 U.S. 279, 299-306 [95 L.Ed.2d 262, 283-287, 107 S.Ct. 1756, 1770-1774]; Turner v. Murray (1986) 476 U.S. 28, 33-37 [90 L.Ed.2d 27, 34-37, 106 S.Ct. 1683] (plur. opn. by White, J.); California v. Ramos, supra, 463 U.S. at pp. 998-999 & fn. 9 [77 L.Ed.2d at pp. 1178-1179], citing cases; People v. Brown (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440], revd. on other grounds sub nom. California v. Brown (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]; People v. Easley (1983) 34 Cal.3d 858, 877-879 [196 Cal.Rptr. 309, 671 P.2d 813].)

For the same reason that these special safeguards are imposed in penalty determinations, I believe that the standard of prejudice for penalty phase errors should be that of the reasonable-possibility test. As the cases reveal, both this court and the United States Supreme Court have sought to prevent, to the extent humanly possible, the occurrence of error which might taint the penalty determination and thereby undermine its reliability. It would plainly frustrate this goal of heightened reliability if we were then to evaluate the prejudice of error actually committed -- which by its nature taints the reliability of

the determination in some degree -- under any standard other than the strictest meaningful standard, that of the reasonable-possibility test.

In my view, the reasonable-possibility test is altogether consistent with the mandate of the state Constitution. Article VI, section 13, provides that no judgment shall be reversed in any case because of any error "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The provision was amended into its present form in 1914, and given its present numbering in 1966.[1/]

In ascertaining the meaning of article VI, section 13, a court is guided by well-settled principles. It starts with the fundamental rule that "A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words." (Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) When, however, it cannot find the meaning of the provision in its words alone, it applies the rule that the object sought to be attained and the evil sought to be avoided are of prime consideration in the task of interpretation. (See San Francisco v. San Mateo (1941) 17 Cal.2d 814, 818 [112 P.2d 595]; In re Quinn (1973) 35 Cal.App.3d 473, 483 [110 Cal.Rptr. 881]; cf. Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 669 [150 Cal.Rptr. 250, 586 P.2d 564] [construction of statutes].)

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1. The predecessor of article VI, section 13, adopted in 1911 as article VI, section 4 1/2, applied only to criminal cases but was otherwise substantially identical.

The words of article VI, section 13, do not define themselves. The point was recognized in People v. O'Bryan (1913) 165 Cal. 55, 64 [130 P. 1042], the first case to construe the provision, and has never been seriously disputed.

A consideration of the purpose of article VI, section 13, however, clearly reveals its meaning. Until the adoption in 1911 of the measure's predecessor, appellate courts in this state applied the rule that "prejudice is presumed from any error of law." (People v. O'Bryan, supra, 165 Cal. at p. 65; see generally Traynor, The Riddle of Harmless Error (1970) p. 13 [hereafter Traynor]; Saltzburg, The Harm of Harmless Error (1973) 59 Va.L.Rev. 988, 1002-1010 [hereafter Saltzburg].)

To be sure, as Professor Saltzburg has stated, "In one sense there is always a 'presumption' that error is harmful, since any violation of the substantive laws and procedural rules which govern the criminal justice system is likely to undercut the concepts of fairness and equality that those laws and rules are meant to preserve." (Saltzburg, supra, 59 Va.L.Rev. at p. 1004.) Such a "presumption" is, of course, legitimate: what makes virtually all errors "erroneous" is their potential to undermine the reliability of the outcome of the proceeding in which they occur.

The presumption-of-prejudice rule that the appellate courts of this state applied before 1911, however, did not rest on such a premise. Rather, it incorporated a virtually irrebuttable presumption and thereby led almost automatically to reversals based on what were perceived to be the most technical and trivial of errors. (Traynor, supra, at pp. 3-4.) For example, in the notorious case of People v. Vice (1863) 21 Cal. 344, the court reversed a conviction for robbery on the ground that the indictment was fatally defective in failing to specify that the property

taken did not belong to the defendant. In the even more notorious case of People v. St. Clair (1880) 56 Cal. 406, the court reversed a conviction for larceny on the ground that the indictment misspelled the word "larceny" as "larcey" and thereby failed to describe an offense. Cases like these, both in California and the nation as a whole, scarcely went unnoticed but rather led to harsh criticism for the courts. (Traynor, supra, at pp. 13-14; Saltzburg, supra, 59 Va.L.Rev. at pp. 1002-1010.)

It was to abrogate the presumption-of-prejudice rule with its effect of almost automatic reversal that the predecessor of article VI, section 13, was adopted in 1911. "Where error is shown it is the duty of the court [under this provision] to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted." (People v. O'Bryan, supra, 165 Cal. at p. 65; see Traynor, supra, at pp. 16-17; Saltzburg, supra, 59 Va.L.Rev. at p. 1006 & fn. 58.)

Thus, both the wording and history of article VI, section 13, require the reviewing court to undertake meaningful harmless-error analysis. But neither expressly or impliedly mandates any specific standard of prejudice for any kind of error in any kind of proceeding.

Meaningful harmless-error analysis can be, and has been, conducted by courts -- including this court -- using the reasonable-possibility test: that standard, of course, finds a familiar expression in the beyond-a-reasonable-doubt test of Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065]. (Traynor, supra, at pp. 37-49; Saltzburg, supra, 59 Va.L.Rev. at pp. 1021-1027.)

As Professor Saltzburg has explained: "Although it has been argued that this test is tantamount to a rule of automatic reversal, it must be remembered that it is a reasonable possibility of prejudice that is required, not just any possibility. . . . It requires neither automatic reversal nor an abdication of judgment. Rather, by requiring the court to make a judgment as to the reasonable impact of the error, it compels the court of appeals to determine whether the criminal trial was tainted with error . . . ." (Saltzburg, supra, 59 Va.L.Rev. at pp. 1021-1022, fns. omitted and italics in original.)

It is true that at the time Hamilton, supra, 60 Cal.2d 105, was decided the jury's discretion to choose between life and death was "absolute" (id. at p. 136), whereas now its discretion is "guided" (Barclay v. Florida (1983) 463 U.S. 939, 950 [77 L.Ed.2d 1134, 1144, 103 S.Ct. 3418] (plur. opn. of Rehnquist, J.). But insofar as harmless-error analysis is concerned, the "guided" discretion that the jury today is constitutionally required to exercise is not significantly different from the "absolute" discretion that it formerly exercised. The Constitution, to be sure, mandates that the states "[provide] 'specific and detailed guidance' to the sentencer" in order to "narrow [its] discretion to impose the death sentence . . . ." (McCleskey v. Kemp, supra, 481 U.S. at pp. 303-304 [95 L.Ed.2d at p. 286, 107 S.Ct. at pp. 1772-1773], italics in original.) But "In contrast to [such] carefully defined standards . . ., the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence. '[The] sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (Id. at p. 304

[95 L.Ed.2d at p. 286, 107 S.Ct. at p. 1773], fn. omitted and italics in original.)

Moreover, such "guidelines" as are defined cannot be deemed to appreciably limit the jury's discretion insofar as harmless-error analysis is concerned. This is so because the jurors are entitled -- indeed constitutionally required -- to weigh the factors established by the "guidelines" as they see fit. The Eighth Amendment ". . . 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" (McCleskey v. Kemp, supra, 481 U.S. at p. 304 [95 L.Ed.2d at p. 286, 107 S.Ct. at p. 1772]; accord, Zant v. Stephens (1983) 462 U.S. 862, 879 [77 L.Ed.2d 235, 251, 103 S.Ct. 2733].) It follows that the jury is "free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty." (People v. Brown, supra, 40 Cal.3d at p. 540.)

As one commentator has said: "The sentencer is free to consider any factor in mitigation, in whatever way it chooses, and to impose mercy if it so desires. But, in considering aggravating circumstances, the sentencer must look only to those that are defined by statutes." (Note, Deadly Mistakes: Harmless Error in Capital Sentencing (1987) 54 U.Chi.L.Rev. 740, 754 [hereafter Note, Deadly Mistakes].)

Accordingly, in view of the character and purpose of the sentencing "guidelines" and the nature of the penalty determination, and especially in view of the jury's absolute discretion to choose life, it is plain that a reviewing court is today no better able to determine the basis of a jury's penalty decision or the effect of a particular error on that decision than it was in the days of Hamilton, supra, 60

Cal.2d 105, when the jury had absolute discretion to choose either life or death.

Indeed, it has been argued with considerable persuasive force that under the requirements of modern Eighth Amendment jurisprudence principled harmless-error analysis is impossible and hence that all penalty phase error must be deemed reversible per se. (Cf. Satterwhite v. Texas (1988) 486 U.S. 249, [100 L.Ed.2d 284, 297, 108 S.Ct. 1792, 1799] (conc. opn. of Marshall, J.) ["the unique nature of a capital sentencing determination should cause this Court to be especially hesitant ever to sanction harmless-error review of constitutional errors that taint capital sentencing proceedings"].)

In the words of one commentator: "[Harmless] error doctrine requires reviewing courts, upon finding an error in the proceedings below, to determine what the sentencer would have done if there had been no error. The appellate court must decide what the result of the trial would have been if the sentencer had heard a different bundle of evidence. This process is ill-suited to capital sentencing review.

"First, where aggravating evidence has been erroneously admitted, the reviewing court must decide whether or not the sentencer would have sentenced the defendant to death without knowledge of this evidence. This assessment is, to be sure, somewhat similar to the determination of harmlessness in noncapital cases: both must look to specific statutorily defined factors. But in a capital case, the sentencer has the freedom to decide how much importance to attach to aggravating circumstances; it may decide, on the basis of its observations at trial, that the aggravating circumstances are not very serious. Thus, the statutory definitions of aggravating circumstances act

as only a partial constraint on the decision of the sentencer in a capital case: the sentencer may find some aggravating circumstances and yet still choose not to impose a death sentence. In noncapital cases or in the guilt phase of a capital case, on the other hand, the tribunal's choice is constrained as soon as it finds that the statutorily defined elements of a crime are present.

"Furthermore, where mitigating evidence has been erroneously withheld, the reviewing court cannot determine what the outcome would have been if the sentencer had heard this evidence. The sentencer had discretion to impose mercy if it so chose. It is one thing to say that an appeals court working from a cold record finds it congenial to decide what a 'reasonable' juror would have done in a particular circumstance; it is quite another to say that the same court can decide what a 'merciful' juror would have done. The decision of the sentencer -- be it jury or judge -- ratifies 'community values' that a distant reviewing court can neither duplicate nor, perhaps, understand. Since the sentencer must have discretion to spare a defendant from execution, and that discretion contemplates acts of mercy, it is not only anomalous, but also impossible, for reviewing courts to undertake the rational inquiry outlined by Chapman [v. California (1967) 386 U.S. 18 (17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065)].

"Finally, even if the reviewing court were able to predict the effect of the error with regard to a particular aggravating or mitigating factor, it still would not be able to carry out the harmless error test. The state (or the defendant, if the error is nonconstitutional) must show that the aggravating evidence outweighs the mitigating evidence. But it is the sentencer that decides how much weight to give to the aggravating and mitigating factors, and that decision is not amenable to appellate review.

Because the sentencer may -- indeed, must -- consider all factors in whatever balance it chooses in deciding upon the sentence, the appellate court cannot determine either beyond a reasonable doubt or with a reasonable certainty what impact the aggravating or mitigating factor would have had on the decision.

"Thus, the sentencer's discretion and its ability to impose mercy make it impossible for a reviewing court to weed out 'harmless' error in capital sentencing proceedings. The reviewing court is simply unable to assess the impact of any error on the sentencer -- both because of uncertainty over the error's place in the sentencer's deliberations and because of the sentencer's ability to impose life imprisonment instead of death whenever it chooses. When there is error, therefore, death sentences must be reversed. The premise of the harmless error doctrine is that the impact of errors on trial and sentencing courts can be assessed by appellate courts. Where this assessment is impossible, the doctrine should not apply." (Note, Deadly Mistakes, supra, 54 U.Chi.L.Rev. at pp. 754-756, fns. omitted and italics in original.)

While the foregoing argument has considerable persuasive force, the undeniable fact is that it has not won acceptance. Hence, modern Eighth Amendment jurisprudence cannot be held to preclude harmless-error analysis. (See Satterwhite v. Texas, supra, 486 U.S. at p. [100 L.Ed.2d at pp. 293-294, 108 S.Ct. at pp. 1797-1798].) But as I have explained, the principles of that jurisprudence counsel use of the standard for the review of penalty phase error that we adhere to today -- the reasonable-possibility test. Anything less would force a reviewing court to run a constitutionally unacceptable risk of affirming a judgment against a human being for whom death may not be the appropriate penalty.

For the foregoing reasons, I concur in the opinion of the court, which reaffirms the reasonable-possibility test.

KAUFMAN, J. I concur fully in the majority opinion and judgment and write separately only to record an observation about the portion of the concurring and dissenting opinion of Justice Broussard which objects to the majority's use of the concepts of "reasonable jurors" and "a reasonable jury" in applying the "reasonable, i.e. realistic, possibility" standard of prejudice.

It is quite correct that the question to be determined in assessing prejudice is whether "this jury" may have been misled and that in doing so any indications in the record that "this jury" was actually misled may not be ignored. However, in determining the question of prejudice an appellate court must assume the jury was composed of reasonable persons and that they would react to the evidence and interpret the instructions in a reasonable way. The reason is obvious: otherwise an appellate court could not assess prejudice, for it would have no way of knowing in what idiosyncratic way an unreasonable juror might have been affected by the error or would have interpreted the instruction in question.

Thus, the majority is completely correct in utilizing the concepts of "a reasonable jury" and "reasonable jurors" in applying the unanimously adopted prejudice standard. (See, e.g., Mills v. Maryland (1988) 486 U.S. ___, ___ [100 L.Ed.2d 384, 394-395, 108 S.Ct. 1866]; accord, California v. Brown (1987) 479 U.S. 538, 541 [93 L.Ed.2d 934, 940, 107 S.Ct. 837, 839]; see also People v. Kimble (1988) 44 Cal.3d 480, 505, 509, 510 [244 Cal.Rptr. 148, 749 P.2d 803].)

DISSENT BY: BROUSSARD (In Part)

DISSENT: BROUSSARD, J., Concurring and Dissenting.

I.

I concur in the affirmance of the conviction and in the majority's discussion of the special circumstance. I join wholeheartedly in the majority's conclusion that a penalty judgment must be reversed if there is a reasonable possibility that, absent error, the jury would have rendered a different verdict.[1] But I am concerned about the majority's use, in applying that standard, of the concepts of "a reasonable jury's verdict" and "reasonable jurors." (Ante, p. 448.) The question before us in each case is the impact of the error on the jury that tried the case.[2] If we have no other information about the jury's reasoning we may have to conjecture how a "reasonable jury" would proceed. But if, as is often the case, we have some reason to know how this jury is proceeding, we could not disregard that knowledge merely because a "reasonable jury" would approach the case differently. If, for example, a question from the jury revealed that the jurors were particularly interested in certain inadmissible evidence or

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1. A different verdict, under our test of error, does not necessarily mean a verdict of life imprisonment without possibility of parole. A hung jury is a more favorable verdict, since it not only avoids the death penalty but also, upon a second occurrence, gives the trial judge discretion to deny a retrial and impose a penalty of life without possibility of parole. (Pen. Code, @ 190.4, subd. (d).) Thus we need only inquire whether it is reasonably possible that a single juror might have changed his or her vote in the absence of error.

2. Similarly in reviewing motions to modify a verdict under Penal Code section 190.4, we consider whether the judge who tried the case ruled properly on the motion. We do not discuss how a hypothetical reasonable judge would rule.

in a particular erroneous argument, we could not uphold a verdict on the theory that a reasonable jury would ignore that evidence or disregard that argument.

II.

I respectfully dissent from the majority's affirmation of the penalty judgment. There were simply too many errors at the penalty trial for me to conclude that there is no reasonable possibility that, absent those errors, the jury would have returned a verdict more favorable to defendant.

1. The trial court erred under People v. Robertson (1983) 33 Cal.3d 21, 53-55 [188 Cal.Rptr. 77, 655 P.2d 279], in failing to instruct the jury that it could not consider past criminal activity as an aggravating factor unless it found beyond a reasonable doubt that defendant committed the crimes in question. The majority acknowledge this error. (Ante, p. 446.)

2. The trial court erred twice under People v. Boyd (1985) 38 Cal. 3d 762, 772-776 [215 Cal.Rptr. 1, 700 P.2d 782], by admitting evidence of noncriminal conduct.

(a) The court admitted evidence that defendant threatened to sodomize another prisoner. The admissibility of such evidence under Penal Code section 190.3, factor (c), depends upon proof that defendant committed a criminal act involving personal violence or the threat of such violence. (See People v. Boyd, supra, 38 Cal.3d 762, 772-776.) In arguing for admissibility, the Attorney General mistakenly assumes that the threat to commit a violent criminal act is enough to establish admissibility under factor (c). It is not. The evidence must show a criminal act, and threatening words without

more do not constitute a criminal act. Accordingly the evidence in question was inadmissible under Boyd.

(b) The court also admitted evidence of a "food riot" during which defendant and other inmates threw food from their cells into the hallway to protest the allegedly inadequate quantity served. While some inmates threatened the guards, there was no proof that defendant did so, and in any case the utterance of a threat by an inmate in no position to carry out the threat is not a crime (see Boyd, supra, 38 Cal.3d at pp. 777-778). The only violence defendant could or did perpetrate was to the food, and violent injury to property is insufficient to justify admissibility. (Boyd, 38 Cal.3d at p. 776.)

3. The trial court failed to instruct the jury that Penal Code section 190.3, factor (k) includes as a mitigating consideration not only those matters which extenuate the gravity of the crime, but also any other aspect of the defendant's character or record that he proffers as a basis for a sentence of less than death. (See People v. Easley (1983) 34 Cal.3d 858, 878, fn. 10 [196 Cal.Rptr. 309, 671 P.2d 813].)

4. The prosecutor erroneously told the jury, contrary to People v. Davenport (1985) 41 Cal.3d 247, 288-289 [221 Cal.Rptr. 794, 710 P.2d 861] and People v. Rodriguez (1986) 42 Cal.3d 730, 789-790 [230 Cal.Rptr. 667, 726 P.2d 113], that the absence of evidence showing the existence of various statutory mitigating considerations requires the jury to weigh those considerations as aggravating factors in determining penalty.

This is the most egregious case of Davenport error we have yet encountered. The prosecutor went down the statutory list, and characterized every factor as aggravating. With respect to factor (d) -- mental or

emotional disturbance -- he said, "This defendant . . . has no mental or emotional disturbance other than the fact that he is just a sociopath, and antisocial and likes to hurt people. So in this particular case that's an aggravating factor." With respect to factor (e) -- victim participation -- he found the absence of such participation made it an aggravating factor. He said the same as to factor (f) -- belief in moral justification. For factor (g) -- duress -- he noted that no one dominated the defendant and compelled him to kill the victim, so "[this] is an aggravating factor." Defendant presented substantial evidence of factor (h) -- mental disease or defect which impairs defendant's capacity to conform to legal requirements -- but the prosecutor argued that the evidence did not establish "diminished capacity," and hence "that is a aggravating factor." He characterized defendant's age (factor (i)) as aggravating. He said that factor (j) -- whether defendant was an accomplice -- was aggravating because defendant acted alone. And in summation he asserted that factor (k) -- any other circumstance which extenuates the gravity of the crime -- was aggravating even though in People v. Boyd, supra, 38 Cal.3d 762, 775-776, we explained that factor (k) can only be mitigating.

The majority acknowledge that the prosecutor's argument "seems contrary to Davenport, but state that "we do not consider the prosecutor's argument to be reversible prosecutorial misconduct, because a timely objection and admonition could have cured any harm." (Ante, p. 456.) This statement sloughs over the question whether defense counsel can reasonably be expected to object to such argument in a trial preceding Davenport, supra, 41 Cal.3d 247, or Rodriguez, supra, 42 Cal.3d 703, and the question whether the trial court would have sustained such an objection. (Since the judge, ruling on the motion to modify the judgment, said that various neutral or

mitigating factors were aggravating it is likely that he would have overruled any Davenport objection.)

I agree, however, that there was no prosecutorial misconduct. At the time of argument the prosecutor could reasonably believe that he could properly argue the absence of evidence of a mitigating factor rendered the factor aggravating. But the question of misconduct is irrelevant. As we explained in People v. Lucero (1988) 44 Cal.3d 1006, 1031, footnote 15 [245 Cal.Rptr. 185, 750 P.2d 1342], "[our] concern is not with the ethics of the prosecutor or the performance of the defense, but with the impact of the erroneous interpretation of the law on the jury." The majority tacitly concede the point, for in this, as in every other case involving Davenport error, they do not stop with noting the failure to object, but go on to treat the issue on its merits.

The majority further argue that the jury was instructed to consider the listed factors only "if relevant," and that a reasonable jury "would have understood that it was allowed to give to those factors whatever little weight they deserved." (Ante, p. 456.) But the jury does not know what factors the law considers relevant. The vice of Davenport error is that it tells the jury that factors are relevant when in fact they are not, and that factors are aggravating when in fact they are neutral or mitigating. Of course a jury which followed the prosecutor's advice would still be "allowed" to assign the factors what little weight they deserved. It is also allowed to assign them a great weight which they do not deserve. The one thing it cannot do is the thing it is supposed to do: assign them no aggravating weight at all.

5. In his argument to the jury, as in his prior voir dire of the jurors, the prosecutor misinformed the jury concerning the process by which they should determine

the penalty, in violation of People v. Brown (1985) 40 Cal.3d 512, 541 [220 Cal.Rptr. 637, 709 P.2d 440], reversed on other grounds, sub nomine, California v. Brown (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].

The prosecutor began his closing argument by reminding the jurors of the voir dire, and said that "we all agreed that if in weighing these factors the aggravating factors outweighed, are heavier than the mitigating factors, the penalty to be imposed is the death penalty." We must therefore examine the voir dire to find the "agreement" to which the prosecutor referred.

The prosecutor told one prospective juror, who actually served on the jury, that "if you determine that the aggravating factors are just a little bit heavier than the mitigating factors, then the law requires you to return a death penalty verdict." The dialogue continued: Prosecutor: "Do you have any quarrel with that?" Juror: "No." Prosecutor: "And, can you look at yourself and say, 'okay,' . . . I can feel these aggravating factors outweigh the mitigating factors, but I am still kind of on the fence about the death penalty. I am not sure about the death penalty, but in my mind I feel the aggravation outweighs the mitigation. You will comply with the law and return a death penalty verdict?" Juror: "Yes. If that's how I feel. If I feel that one outweighs the other."

The prosecutor's statements were clearly error, because they left the juror in question with the mistaken impression that the jury "was 'required' to return a sentence of death if 'aggravation outweighed mitigation' without, or even despite, each juror's personal conclusion from the evidence, about whether a sentence of death was appropriate under the circumstances for the offense and offender." (People v. Allen (1986) 42 Cal.3d 1222, 1278

[232 Cal. Rptr. 849, 729 P.2d 115], italics in original.) While other aspects of the voir dire of this juror were not necessarily erroneous -- she said she would examine the evidence and impose the death penalty only when "necessary," whatever that meant -- they did not make it clear that the quoted remarks of the prosecutor were in error, and that it was her duty not to impose the death penalty, regardless of the balance of aggravation and mitigation, unless she believed death to be the appropriate penalty. Thus at least one juror who tried defendant probably did so under an erroneous view of her responsibility. The voir dire of other jurors was not as obviously erroneous, but nonetheless proceeded in much the same vein.[3]

The prosecutor then reviewed the statutory factors, concluding, erroneously, that all were aggravating. Instead of informing the jurors that they should consider these factors in deciding whether death was the appropriate penalty, he told them that the law makes that

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3. The prosecutor did not tell the other jurors that they had a duty to return a death verdict whenever aggravation outweighed mitigation in spite of doubts whether death was appropriate. He did, however, describe the process of determining penalty as an arithmetical process devoid of the moral and normative considerations implicit in any attempt to determine the appropriate penalty. He told one juror, for example, that "You add this up, and if the aggravating evidence outweighs the mitigating evidence, then the judge will instruct you that you have to return the death penalty." He told another: "If the aggravating factors are heavier than the mitigating factors or if the aggravating factors outweigh the -- or outnumber the mitigating factors, then the law requires you to vote for the death penalty." To another he said, "[If] the aggravating factors, the factors that aggravate the defendant's past conduct and this crime here, if that outweighs the mitigating evidence, the law requires that you vote for the death penalty. . . . There are actual factors that the judge will tell you about. And, you can just add those up and weigh them."

determination for them: "[The] law says if you add those factors up and the aggravating outweigh the mitigating, that's a case where the death penalty is the only appropriate penalty."[4]

III.

These errors do not exist in isolation; instead, each adds to the impact of the others. The prosecution strategy follows a consistent pattern. At voir dire, the prosecutor told the jurors that if aggravating factors outweighed mitigating factors a death verdict was required. With attention thus focused on the relative number of aggravating and mitigating factors, and the evidence presented to support such factors, the prosecutor introduced inadmissible evidence of aggravating factors, and other evidence admissible only under a reasonable-doubt instruction, which was not given.

The prosecutor's closing argument put the package together. He told the jury that five irrelevant factors were aggravating. He told them that two others which could only be mitigating -- factors (h) and (k) -- were aggravating. He concluded by explaining that all eleven of the factors were aggravating, when in fact there were three aggravating, two mitigating, and the rest irrelevant. Having thus left the jury with a highly exaggerated view of the number of aggravating factors, he reminded them that

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4. Inventing a kind of inverse Gresham's Law (Gresham's Law is that bad money drives out good money), the majority assume that correct argument dispels the effect of incorrect argument. Thus when the prosecutor states the law incorrectly, and defense counsel states it correctly, the majority assume without further inquiry that the jury followed the defense version. It is not a matter of roles; doubtless if the prosecutor stated the law correctly and defense counsel misinformed the jury, the majority would be equally willing to assume the jury followed the prosecutor's version.

on voir dire they had agreed to vote for a death verdict if aggravation outweighed mitigation and concluded that the law required them to return a death verdict. In short, the combined effect of the prosecution strategy and the numerous penalty phase mistakes in this case was to leave the jurors with the erroneous impression that, if they were faithfully to perform their legal duty, they must return a death verdict. I conclude that it is reasonably possible that, but for the cited errors, the jury would have returned a more favorable verdict.

IV.

In addition to the errors during the penalty trial, the court also erred in ruling on the motion to modify the judgment (Pen. Code, @ 190.4). Its ruling erroneously stated that the absence of evidence of mitigating factors rendered those factors aggravating, and unconstitutionally limited the scope of mitigating evidence under Penal Code section 190.3, factor (k). The majority opinion acknowledges those errors, but states since it found similar errors did not prejudice the jury's penalty determination, by analogy such errors did not prejudice the judge's ruling. (Ante, p. 462.)

The analogy is faulty. In finding the Davenport and factor (k) errors nonprejudicial, the majority speculate that the jury may have rejected the prosecutor's mistaken arguments. That reasoning does not apply to our review of the judge's ruling on the motion for modification. We cannot speculate that the judge may have rejected the prosecutor's theory and decided the case according to a correct view of the law; we know, from his written order, that he shared the prosecutor's misconception.

In effect, the majority are saying that even though the judge had a totally skewed view of the case -- he thought

there were eleven aggravating factors and no mitigating factors, when in fact there were three aggravating and two mitigating -- he still would have reached the same result under a correct view of the law. He might have. But to claim that it is not reasonably possible that he would have reached a different result, and on that basis to condemn a man to die, goes further than I am willing to go.

APPENDIX B

APPENDIX B

IN RE BROWN

In re **JOHN GEORGE BROWN** on Habeas Corpus.

S037992

SUPREME COURT OF CALIFORNIA

17 Cal. 4th 873; 952 P.2d 715; 72 Cal. Rptr. 2d 698

Filed: April 2, 1998

PRIOR HISTORY: Superior Court of Orange County. Crim. No. 22646. Kenneth E. Lae, Judge.

DISPOSITION: The petition for writ of habeas corpus is granted. The judgment of conviction is vacated, and petitioner is remanded to the Superior Court of Orange County.

COUNSEL: Attorneys for Appellant: Donald Etra, Michael M. Crain and Rowan K. Klein, under appointments by the Supreme Court, Sidley & Austin, William Archer, Mark Anchor Albert, Joel K. Liberson and Robert A. Holland, for Petititioner.

Attorneys for Respondent: Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood, Garrett B. Beaumont and Robert M. Foster, Deputy Attorneys General, for Respondent.

JUDGES: BROWN, J. WE CONCUR: MOSK, J., WERDEGAR, J., CROSBY, J.* DISSENTING OPINION BY KENNARD, J.

*Honorable Thomas F. Crosby, Associate Justice, Court of Appeal, Fourth District, Division 3, assigned by the Chief

Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: BROWN

OPINION:

I. INTRODUCTION

Petitioner John George Brown was convicted of capital murder, the underlying facts of which are fully recounted in People v. Brown (1988) 46 Cal. 3d 432, 250 Cal. Rptr. 604, 758 P.2d 1135 (Brown I) . Briefly, petitioner shot and killed Garden Grove Police Officer Donald Reed. Reed and several other officers were pursuing him as he was leaving the Cripple Creek Bar. (Id. at p. 440.) Upon reaching the exit, petitioner turned and fired eight shots, killing Reed and seriously wounding two other officers and two civilians. Once outside the bar, he hid in some bushes where he was located two hours later. The probable murder weapon, a .22-caliber semiautomatic handgun, was found nearby. At trial, petitioner asserted a defense of diminished capacity, claiming he had been under the influence of methamphetamine. (Id. at p. 441; see former Pen. Code, @ 22.) The prosecution rebutted this claim with evidence a sample of his blood had tested negative for any drugs. (Brown I, supra, 46 Cal. 3d at p. 441.)

A jury convicted petitioner of first degree murder and found true the special circumstance allegation of intentionally killing a peace officer engaged in the performance of his duties. (Pen. Code, @ 190.2, subd. (a)(7).) Following penalty phase evidence, the jury determined the punishment should be death. (Brown I, supra, 46 Cal. 3d at pp. 441-442.) On automatic appeal, this court affirmed the judgment.

Thereafter, petitioner sought a writ of habeas corpus, alleging the prosecution committed Brady error[1] in failing to disclose that the result of a radioactive immunoassay (RIA) of his blood sample was positive for phencyclidine (PCP). The negative results introduced at trial were based on gas chromatography mass spectrometer (GC/MS) testing.

We issued an order to show cause. Because of factual conflicts raised by respondent's return, we ordered a reference hearing to resolve the following questions:

Did the prosecution disclose the positive PCP finding to petitioner, his investigator, or his counsel before or during trial?

Did the positive PCP finding from the RIA test indicate that there was PCP or a PCP analog in petitioner's blood at the time of the crimes? If so, did the subsequent negative PCP finding from the GC/MS test establish that there was no PCP or PCP analog in petitioner's blood at the time of the crimes? How can the results of the two tests be reconciled?

Having considered the record of the hearing and petitioner's original trial in light of controlling United States Supreme Court authority, we conclude the prosecution failed to disclose material exculpatory evidence and, therefore, now grant relief.

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1. Brady v. Maryland (1963) 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (Brady).

II. DISCUSSION

A. Nondisclosure

1. Factual findings

On the disclosure question, the evidence at the reference hearing established that the Orange County Sheriff Coroner Department Forensic Science Services (the crime lab), which tested petitioner's blood, utilized a multipage form to record the results of its toxicological examination. The top page, on which lab personnel recorded the GC/MS result, was referred to as the "result sheet." The bottom page, with the RIA result, was designated the "work sheet." At the time petitioner's blood was tested, the standard procedure of the crime lab upon completion of the toxicology work was to send a copy of the result sheet to the prosecutor and defense counsel; for reasons of laboratory protocol, however, a copy of the worksheet was sent only on specific request. According to Frank Fitzpatrick, the chief criminalist responsible for management of the crime lab clerical staff at the time, notations on petitioner's worksheet indicated to him a copy had been sent to Deputy Public Defender Michael Beecher on October 16, 1980, via county messenger.

Michael Beecher, who represented petitioner from the preliminary hearing through November 1980 when he became advisory counsel, testified that on October 16, 1980, he telephoned the crime lab to request information on petitioner's blood testing and received a copy of the result sheet the next day. He had no recollection, file notation, or other indication he ever requested or received a copy of the worksheet. Petitioner's trial counsel, Daye Shinn, also testified he did not receive or see a copy of the worksheet before or during trial, nor did petitioner or

his investigator.[2] The prosecutor also was unaware of the document until it was brought to his attention in conjunction with the present proceedings. The referee examined the case files of the public defender, the district attorney, and the Garden Grove Police Department and found no copy of the worksheet in any of them.

With respect to our first question, the referee found the witnesses on both sides credible, but ultimately concluded "the evidence preponderates that the documentation, including the positive RIA finding, was freely available, disclosed and duly forwarded to defense counsel before trial, as requested." He also determined there was no evidence "any police agency or the District Attorney withheld or concealed information." Petitioner objects to these and related findings as unsupported by the record. We need not definitively resolve his objections for the more fundamental reason that these findings do not accurately respond to the specific question posed in our reference order--did the prosecution disclose the RIA result to petitioner or anyone acting on his behalf? Relevant to this query, the referee impliedly found the prosecutor had no knowledge of the worksheet and thus could not have disclosed it. The referee also drew "a reasonable inference that [the worksheet] was not received" by Beecher based on testimony he was unaware of its existence. The uncontradicted evidence also confirms neither petitioner nor Shinn ever saw the document, and the referee makes no findings, express or implied, to the contrary.

As we explain, these latter findings are determinative. Responsibility for Brady compliance lies exclusively with

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2. Before the appointment of Shinn, petitioner represented himself for approximately one year and filed a formal discovery motion requesting all laboratory reports.

the prosecution, including the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." (Kyles v. Whitley (1995) 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (Kyles) .) Whatever the reason for failing to discharge that obligation, the prosecution remains accountable for the consequence. (Id. at pp. 437-438.)

2. Governing legal principles

Pursuant to Brady, supra, 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (id. at p. 87), a general request, or none at all (U. S. v. Agurs (1976) 427 U.S. 97, 107, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (Agurs)). The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf . . . ." (Kyles, supra, 514 U.S. at p. 437.) Courts have thus consistently "declined 'to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.'" (United States v. Auten (5th Cir. 1980) 632 F.2d 478, 481.)[3] "A contrary holding would enable the

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3. See, e.g., Smith v. Secretary Dept. of Corrections (10th Cir. 1995) 50 F.3d 801, 824 ("the prosecution" extends to law enforcement personnel and other arms of the state involved in investigative aspects); U. S. v. Brooks (D.C. Cir. 1992) 296 U.S. App. D.C. 219, 966 F.2d 1500, 1503 (Brooks) (duty to investigate based on "close working relationship" between police and United States Attorney); U. S. v. Osorio (1st Cir. 1991) 929 F.2d 753, 761 (Osorio) ("The prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge."); Carey v. Duckworth (7th Cir. 1984) 738 F.2d 875, 878

prosecutor 'to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial,' [citation]." (Martinez v. Wainwright, supra, 621 F.2d 184 at p. 188; United States ex rel. Smith v. Fairman (7th Cir. 1985) 769 F.2d 386, 391-392.) Thus, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." (Giglio v. United States (1972) 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763; Kyles, supra, 514 U.S. at p. 439.)

As a concomitant of this duty, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. "The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation." (U. S. v. Payne (1995) 63 F.3d 1200, 1208 (Payne); see Smith v. Secretary Dept. of Corrections, supra, 50 F.3d at pp. 824-825, and cases cited therein.) The Supreme Court recently reiterated this principle: "whether the prosecutor succeeds or fails in meeting this obligation [to learn of favorable evidence] (whether, that is, a failure to disclose is in good faith or bad faith, [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." (Kyles, supra, 514 U.S. at pp. 437-438; see also Giglio v. United States, supra, 405 U.S. at p. 154.)[4]

("[A] prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."); Martinez v. Wainwright (5th Cir. 1980) 621 F.2d 184, 186 ("The duty to produce requested evidence falls on the state; there is no suggestion in Brady that different 'arms' of the government are severable entities. [Citation.]").

4. See, e.g., In re Malone (1996) 12 Cal. 4th 935, 977, fn. 22, 911

3. Application to the facts

In this case, the uncontroverted record confirms that neither petitioner nor anyone acting on his behalf received a copy of the worksheet. At the reference hearing, Fitzpatrick acknowledged the lab "worked closely with the District Attorney's Office in assisting it in the prosecution of cases"; and there is no serious dispute that in these circumstances it was part of the investigative "team." The prosecutor thus had the obligation to determine if the lab's files contained any exculpatory evidence, such as the worksheet, and disclose it to petitioner. Whether or not he actually did examine the files, the lab personnel's knowledge is imputed.

In United States ex rel. Smith v. Fairman, supra, 769 F.2d 386, an investigating officer examined a gun the defendant allegedly used to shoot at two police officers and commit a robbery. The day after the shooting, the investigator recorded on a firearms worksheet that he found the gun inoperable. (Id. at p. 389.) When he prepared his official report, however, he failed to include this information "because the only bullets found at the scene had been fired from [one of the officers'] guns"; "it was departmental procedure only to report the results of a match between the bullets recovered from the scene of a crime and the guns submitted for testing." (Id. at pp. 389-390, fn. omitted.) The firearms report was placed in the investigator's files and not disclosed to the prosecutor

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P.2d 468; People v. Little (1997) 59 Cal. App. 4th 426, 433; Smith v. Secretary Dept. of Corrections, supra, 50 F.3d at pages 824-825; United States v. Buchanan (10th Cir. 1989) 891 F.2d 1436, 1442; United States v. Endicott (9th Cir. 1989) 869 F.2d 452, 455; United States ex rel. Smith v. Fairman, supra, 769 F.2d at page 391; Carey v. Duckworth, supra, 738 F.2d at pages 877-878; United States ex rel. Montgomery v. Ragen (N.D. Ill. 1949) 86 F. Supp. 382, 387.

or the defendant. Although the prosecutor had no actual knowledge of the information, the reviewing court found Brady error in light of the "closely aligned" working relationship between the investigating officer and the prosecution. (Id. at p. 391.) "We believe that the purposes of Brady would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure. [Citation.] . . . . The fact that the prosecutor in this case was blameless therefore does not justify the State's failure to produce [the] firearms worksheet." (Id. at pp. 391-392.)

Any other rule would leave the defendant's due process rights to the fortuity of a subordinate agency's procedural protocol, which the Supreme Court has squarely rejected. "Any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." (Kyles, supra, 514 U.S. at p. 438.) Similarly in this case, the crime lab's failure to apprise the prosecution of the worksheet did not relieve the prosecutor of his obligation to review the lab's files for exculpatory evidence. Thus, he remained ultimately responsible when the defense did not receive a copy.

Nor would the crime lab's attempt to transmit the worksheet be sufficient to satisfy the prosecutor's obligation. Such a result would be fundamentally at odds with the due process imperatives of the disclosure rule. The principles Brady and its progeny embody are not abstractions or matters of technical compliance. (Cf. Unted States v. Leon (1984) 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405.) The sole purpose is to ensure the defendant has all available exculpatory evidence to mount

a defense. To that end, a document sent but not received is as useless as a document not sent at all. In both situations, the right to a fair trial is equally denied. A comparable situation arose in United States v. Consolidated Laundries Corporation (2d Cir. 1961) 291 F.2d 563, in which "through unexplained acts, certain of the [material exculpatory documents] in the Government's custody were misplaced and consequently were not shown to defendants when inspection was ordered. This failure to produce deprived the defendants of evidence which would have been helpful to them . . . . For practical purposes the [documents] were temporarily lost. We hold this was negligence chargeable to the prosecution." (Id. at p. 570.)

Equally important, the Supreme Court has unambiguously assigned the duty to disclose solely and exclusively to the prosecution; those assisting the government's case are no more than its agents. (Kyles, supra, 514 U.S. at p. 438; Giglio v. United States, supra, 405 U.S. at p. 154; Fero v. Kerby (10th Cir. 1994) 39 F.3d 1462, 1472, fn. 12.) By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance. Since the prosecution must bear the consequences of its own failure to disclose (see, e.g., U. S. v. Ellis (4th Cir. 1997) 121 F.3d 908, 914 (Ellis); United States v. Consolidated Laundries Corporation, supra, 291 F.2d at p. 570), a fortiori, it must be charged with any negligence on the part of other agencies acting in its behalf (Fero v. Kerby, supra, 39 F.3d at p. 1472, fn. 12; cf. Ellis, supra, 121 F.3d at p. 914 [defense counsel's failure to renew request for witness statements at trial does not discharge prosecution's Brady obligation]; U. S. v. Alvarez (9th Cir. 1996) 86 F.3d 901, 905 (Alvarez) [delegating to nonattorney police officer responsibility to determine if officers' rough notes contain Brady material deemed "problematic"]; Walker v. City of New York (2d Cir. 1992) 974 F.2d 293, 299 ["It is

appropriate that the prosecutors, who possess the requisite legal acumen, be charged with the task of determining which evidence constitutes Brady material that must be disclosed to the defense. A rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion."]) . Accordingly, the risk and consequences of nonreceipt must fall to the prosecution.

Despite any seeming unfairness to the prosecution, no other result would satisfy due process in this context. "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." (Brady, supra, 373 U.S. at p. 87; Kyles, supra, 514 U.S. at pp. 437-438; Smith v. Phillips (1982) 455 U.S. 209, 219, 71 L. Ed. 2d 78, 102 S. Ct. 940; see Agurs, supra, 427 U.S. at p. 110 [Constitutional error under Brady results from "the character of the evidence, not the character of the prosecutor."].) Declining to hold the state "accountable under Bagley and Brady for evidence known only to police investigators and not to the prosecutor . . . would amount to a serious change of course from the Brady line of cases." (Kyles, supra, 514 U.S. at p. 438, fn. omitted.) "The prosecutor has ready access to a veritable storehouse of relevant facts and, within the ambit of constitutional, statutory and jurisprudential directives, this access must be shared 'in the interests of inherent fairness . . . to promote the fair administration of justice.' [Citation.] If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the [government]." (United States v. Auten, supra, 632 F.2d at p. 481.) As one court has expressed it: "We suspect the courts' willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that an inaccurate conviction based on government failure to turn

over an easily turned rock is essentially as offensive as one based on government non-disclosure. [Citation.]" (Brooks, supra, 966 F.2d at p. 1503.)

"In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.' [Citation.]" (Kyles, supra, 514 U.S. at p. 438; see, e.g., United States ex rel. Smith v. Fairman, supra, 769 F.2d at p. 390 & fn. 1; Carey v. Duckworth, supra, 738 F.2d at p. 878 & fn. 4.) Thus, while the Constitution does not impose a duty "to allow complete discovery of [the prosecutor's] files as a matter of routine practice" (Agurs, supra, 427 U.S. at p. 109), the Supreme Court has on more than one occasion urged the "the careful prosecutor" to err on the side of disclosure and, by necessary extension, thorough examination of investigative files. (Kyles, supra, 514 U.S. at p. 440; Agurs, supra, 427 U.S. at p. 108; Giglio v. United States, supra, 405 U.S. at p. 154; see Alvarez, supra, 86 F.3d at p. 905.)

Although rigorous, we do not perceive the duty imposed by Brady as too onerous. (Cf. In re Littlefield (1993) 5 Cal. 4th 122, 135, 851 P.2d 42 [cataloguing extent of prosecution's obligation to disclose in discovery context].) "Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair." (Moore v. Illinois (1972) 408 U.S. 786, 809-810, 33 L. Ed. 2d 706, 92 S. Ct. 2562 (conc. and dis. opn. of

Marshall, J.); Alvarez, supra, 86 F.3d at p. 905.)[5] This obligation serves "to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " (Kyles, supra, 514 U.S. at p. 439, quoting Berger v. United States (1935) 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629; United States v. Auten, supra, 632 F.2d at p. 481.) It also tends "to preserve the criminal trial, as distinct from the prosecutor's private deliberations [or some other agency's independent assessment of materiality], as the chosen forum for ascertaining the truth about criminal accusations. [Citations.]" (Kyles, supra, 514 U.S. at p. 440; Alvarez, supra, 86 F.3d at p. 905.)

Here, as in most circumstances, Brady compliance demanded no more than simple advertence. The evidence was readily accessible to the prosecution. A cursory review of the crime lab's file would have revealed the existence of the RIA test result. At the reference hearing, the prosecutor acknowledged that he would have promptly divulged the information had he been aware of it. Regardless of the reason, he failed to do so. Under established constitutional principles, we thus resolve the threshold inquiry as to disclosure in petitioner's favor.

B. Materiality of the RIA test

In light of this conclusion, we turn to the question of materiality, for not every nondisclosure of favorable evidence denies due process. "Such suppression of

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5. "Of course the prosecutor's own interest in avoiding surprise at trial gives him a very considerable incentive to search accessible files for possibly exculpatory evidence, quite independent of Brady." (Brooks, supra, 966 F.2d at pp. 1502-1503; Osorio, supra, 929 F.2d at p. 761.)

evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with 'our overriding concern with the justice of the finding of guilt,' [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (United States v. Bagley (1985) 473 U.S. 667, 678, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (Bagley).)

1. Factual findings

With respect to the differing RIA and GC/MS test results, the evidence at the reference hearing established that the crime lab utilized the RIA as a screening mechanism for PCP and PCP analogs. Because in 1980 the process had certain limitations, scientific protocol required confirmation of a positive result by GC/MS testing. Dr. Vina Spiehler, an expert who testified for respondent, explained that various circumstances, such as cross-reactivity (detection of some other drug) or flaking (incomplete precipitation before final analysis) as well as operator error, could cause the RIA to produce a false positive. In Spiehler's experience, such a false positive could account for a discrepancy between RIA and GC/MS test results. A disparity might also arise in two other situations: if the concentration of PCP in the test sample were below the cutoff standard for the GC/MS, or if the sample contained a PCP analog. Because the GC/MS process is drug-specific, it would require the use of a different standard to confirm the presence of an analog. Based on her research and experience, Spiehler opined that the probability "a positive RIA actually represented PCP in that sample" was 37 percent.[6] Spiehler's

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6. The precise basis, statistical or otherwise, of this calculation is unclear from the record. However, Spiehler incorporated into her probability determination data reflecting a 98 percent correlation

testimony substantially corresponded to that of Dr. Ferris Pitts, petitioner's expert.

Notes recorded by Bonnie Driver, the criminalist who performed the testing of petitioner's blood, indicated she used a 25-nanogram-per-milliliter calibration standard when she ran the GC/MS. According to Fitzpatrick, the cutoff "certainly [was] far below 25 nanograms. Possibly as low as ten nanograms." However, in her declaration submitted in support of respondent's return, Driver states, "At this time I am unable to say if the cutoff level was 10 ng or below." In Pitts's opinion, only the graph printouts run on the standard and blanks used to calibrate the GC/MS would establish the cutoff. Those printouts were unavailable and had apparently been destroyed by the crime lab. According to Pitts, the RIA was generally more sensitive than the GC/MS and could detect PCP "sometimes as low as one or two nanograms, per milliliter in the original blood sample" (the equivalent of 0.000001 gram per liter). Spiehler also testified experts in the field "thought it might be possible to detect as little as . . . two nanograms [of PCP] per milliliter [by RIA] . . . ."

In response to our series of questions concerning the differing test results, the referee's findings focused on the RIA's function as a screening mechanism and the possibility of false positives. He also adopted Spiehler's probability analysis. The referee concluded the GC/MS result "showed that PCP was not detectable in petitioner's blood" because printout graphs did not have any "mass points" (numerical indications of the test sample's chemical structure) at the appropriate ion levels. According to his findings, a mass point would also appear

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between RIA and GC/MS results, both positive and negative.

if a PCP analog were present because it "would be expected to have the same 'backbone' as PCP."

The referee reconciled the differing results by essentially discounting the RIA as a false positive due to the "inherent unreliability of the test . . . ." Because the GC/MS was "more reliable and precise" and its result was "considered final" by the crime lab, the "negative" finding for PCP or PCP analogs was the more accurate. Accordingly, in answer to our predicate questions he found the positive RIA did not indicate there was PCP or an analog in petitioner's blood at the time of the crimes and the subsequent negative GC/MS established there was not PCP or an analog in his blood.

Petitioner objects to these findings as inaccurate, and we find the objections well taken to the following extent. Nothing in the record establishes the RIA is inherently unreliable. In fact, both experts testified that studies had shown a 98 percent correspondence between RIA and GC/MS testing. Furthermore, since the GC/MS is in fact more "precise," i.e., specific, for PCP, it could not conclusively negate the presence of a PCP analog--particularly one that did not share sufficient molecular characteristics with PCP. Spiehler testified some analogs have a "different psychalic structure in the backbone," which would not show up on a GC/MS run for PCP. Also contrary to the referee's finding, we find no evidence "blanks and standards" established the GC/MS cutoff level "possibly as low as" 10 nanograms per milliliter. Driver's declaration did not support this conclusion, and it appears undisputed the printout graphs for the blanks and standards had been lost or destroyed.

While we do not discount the referee's ultimate findings, they are incomplete with respect to the questions posed in our reference order. The differing results can be

reconciled on several bases that do not exclude the possibility each test was accurate. If the amount of PCP were below the GC/MS cutoff, the RIA could produce a positive because it is a more sensitive testing procedure. Or, if the substance were an analog that the GC/MS PCP standard would not detect, the RIA would produce a positive result because it is intended to test not only for PCP but for analogs as well, which number over 100. In either situation, the RIA would establish the presence of PCP or an analog in petitioner's blood, and the negative GC/MS would not invalidate that determination. Spiehler also acknowledges that GC/MS testing produces false negatives. The record contains no basis for concluding any one of these explanations for the discrepancy was less likely than the one identified by the referee.

2. Governing legal principles

The current standard of review for Brady materiality was first articulated in Bagley, supra, 473 U.S. 667, although the United States Supreme Court began developing it in earlier decisions.[7] (See Agurs, supra, 427 U.S. at p. 112; Giglio v. United States, supra, 405 U.S.

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7. In the course of this development, the court has identified three situations in which the Brady rule applies, including what it refers to as the "specific request" and the "no request" or "general request" cases. (See Bagley, supra, 473 U.S. at pp. 678-681.) The "reasonable probability" standard applies in each of these circumstances. (Id. at p. 682.) In the third situation, previously undisclosed evidence reveals the prosecution introduced trial testimony that it knew or should have known was perjured. (See Agurs, supra, 427 U.S. at pp. 103-104.) Because the use of perjured or false testimony not only denies due process but "involves a corruption of the truth-seeking function of the trial process" (id. at p. 104), the Chapman (Chapman v. California (1967) 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824) harmless error standard of review applies. (Bagley, supra, 473 U.S. at p. 679, fn. 9.)

at p. 154.) Recently in Kyles, supra, 514 U.S. 419, the court reemphasized four aspects articulated in Bagley critical to proper analysis of Brady error. First, "although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant.) [Citations.] Bagley's touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (Id. at p. 434.)

Second, "it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Kyles, supra, 514 U.S. at pp. 434-435, fn. omitted.)

Third, "once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review." (Kyles, supra, 514 U.S. at p. 435.) The one subsumes the other. (Id. at pp. 435-436.) Fourth, while the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes

of materiality must be considered collectively. (Id. at pp. 436-437 & fn. 10; see also Agurs, supra, 427 U.S. at p. 112, fn. omitted [omission "must be evaluated in the context of the entire record"].)

In Bagley, the court identified another relevant consideration in noting that "an incomplete response to a specific [Brady] request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." (Bagley, supra, 473 U.S. at p. 682.) Given this possibility, "under the ['reasonable probability'] formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." (Id. at p. 683; see, e.g., Payne, supra, 63 F.3d at p. 1209.)

3. Application to the facts

In assessing the materiality of the RIA test result, we begin with the pivotal fact that even without it petitioner offered a diminished capacity defense in an effort to persuade the jury he lacked the ability to premeditate and deliberate at the time of the shooting. Although at trial the claim was based on methamphetamine intoxication, both Beecher and Shinn testified at the reference hearing that the positive RIA test would have refocused the

defense on PCP intoxication or some combination of the two. The record establishes that the following evidence could have been adduced in support of that defense with reasonable follow-up on the positive RIA.[8]

Petitioner had an extensive history of drug abuse including PCP. According to Dr. Kaushal Sharma, a forensic psychiatrist who testified for the defense at trial, PCP "causes a wide variety of symptoms including having the effect of producing [a] psychosis-like condition . . . . [The user] might become . . . extremely violent without provocation." Sharma also explained that PCP can cause "flashbacks" because when ingested it "becomes attached to the fatty tissue in the brain. . . . And every now and then, sometimes a few months down the line the same PCP which is attached to the fatty tissue in the brain is released into circulation, even if the person has not taken any drugs for months he may again certainly start acting crazy because the PCP which is in the fatty tissue is once again being recirculated in the body through the blood, even though they have not taken any PCP today, they may start . . . acting strange because they have taken PCP two months, two weeks ago."

In addition to confirming these chemical properties, Pitts noted PCP can cause psychotropic effects at levels below 10 nanograms per milliliter. He also explained that "PCP is a dissociative anesthetic that produces a mental state in which the recipient is oblivious to what is happening in his or her body . . . and can cause a similar dissociative, unconscious mental state that produces random, detached, inappropriate and violent acts. Such reactions to PCP intoxication are not dose related and are

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8. For purposes of analyzing materiality, we consider both the evidence submitted in support of the petition for writ of habeas corpus and the record of the trial.

variable through time." According to Pitts, certain aspects of petitioner's demeanor at the time of his arrest--excessive perspiration and his calmness--as well as his claim of memory loss are consistent with PCP intoxication.[9] PCP can also "exacerbate a person's pre-existing psychotic condition. . . . At a minimum, PCP can impair or prevent a person's ability to deliberate and premeditate." Under the governing law at the time of petitioner's offenses, a defense expert could have rendered such an opinion on the ultimate question of his state of mind. (See, e.g., People v. White (1981) 117 Cal. App. 3d 270, 276-277, 172 Cal. Rptr. 612; cf. Pen. Code, @ 29.) In addition, the incidence of PCP use was increasing in 1980, and it was used to adulterate other street drugs such as methamphetamine.[10]

The positive RIA test would have been more than simply the linchpin of this defense. As independent scientific evidence of PCP in petitioner's blood at the time of the crimes, it would have enhanced the credibility of the other evidence of PCP intoxication it tended to corroborate. (See In re Sixto (1989) 48 Cal. 3d 1247, 1264, 259 Cal. Rptr. 491, 774 P.2d 164; Kyles, supra, 514 U.S. at p. 449, fn. 19.) We must thus measure not only the likely impact of the RIA itself but also the possible synergistic

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9. With respect to petitioner's dilated pupils, the prosecution presented considerable testimony at trial that this condition was attributable to low ambient lighting at the jail. No tests were administered at the time of arrest or booking to determine whether any aspect of his demeanor specifically evidenced or negated drug intoxication.

10. For all these reasons, a claim of PCP intoxication would not be inconsistent with petitioner's testimony he had ingested methamphetamine during the 24 hours preceding the killing--assuming that after consultation with experts the defense still presented such evidence.

evidentiary effect it could have generated. (Cf. id. at p. 436.)

Granted, the prosecution could, and undoubtedly would, have presented rebuttal evidence, including the fact the RIA test was used by the crime lab as a screening mechanism that required confirmation of any positive results. But by definition rebuttal evidence counters -- it does not preclude -- the defense case-in-chief. Petitioner could also have countered this rebuttal. With respect to the discrepancy between the positive RIA and the negative GC/MS, all experts agree the two can be reconciled if the amount of PCP in the sample were below the GC/MS cutoff level but sufficient for detection by the RIA, or if the detected substance were a PCP analog for which the GC/MS was not calibrated.[11] Spiehler's testimony did not refute these possibilities. Moreover, she essentially confirmed a 98 percent correlation between RIA and GC/MS results, consistent with Pitts's statistic. Thus, notwithstanding the screening function of the RIA, the prosecution's rebuttal would only have resulted in a battle of the experts with significant points of agreement between the two sides.

Respondent does not seriously dispute the conclusion petitioner could have presented a credible diminished capacity defense based on PCP intoxication. In particular, he submits no evidence countering Pitts's declaration on

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11. The habeas corpus record establishes that in early 1980, crime lab personnel had been advised by the federal Drug Enforcement Agency that a "recent theft of a large quantity of 4-methyl piperidine has prompted us to anticipate its appearance in a phencyclidine homolog [or analog]." In his declaration, Pitts notes that a GC/MS calibrated for PCP would not detect this analog because it has different mass points. In his opinion, this circumstance could explain the discrepancy in the two tests.

the ultimate issue of petitioner's state of mind under the influence of PCP and his lack of ability to premeditate and deliberate. While emphasizing the RIA's function as a screening device, respondent does not claim the test would have been inadmissible for this or any other reason; nor does the record support such a finding.[12] Accordingly, the assessment of its evidentiary weight must be left to the trier of fact in light of all other relevant evidence.

As the Supreme Court noted in Kyles, "the inconclusiveness of the physical evidence does not, to be sure, prove Kyles's innocence, and the jury might have found the eyewitness testimony of [two prosecution witnesses] sufficient to convict, even though less damning to Kyles than that of [two other prosecution witnesses subject to undisclosed impeachment]. But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." (Kyles, supra, 514 U.S. at p. 453.) When

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12. The dissenting opinion suggests "it is unclear whether the test result would have been admissible" under the Kelly/Frye rule. (Dis. opn., post, at p. 16.) Although the issue would have been squarely encompassed by our order to show cause, respondent has never raised the possibility of excluding the RIA on this basis; therefore, it has been waived at least for purposes of these proceedings. In any event, the suggestion is largely beside the point to the extent it assumes the defense would not have had the sample retested for PCP and possibly obtained admissible confirmation of the positive result, e.g., by GC/MS testing with a lower cutoff. Moreover, a laboratory protocol that requires confirmation by another testing procedure does not establish the unreliability of positive RIA results; nor does it evidence the methodology is not accepted in the scientific community as reliable. By its nature, the testimony of both experts in this case demonstrated that in fact the RIA would meet the requisite standard of admissibility.

the verdict depends upon the resolution of conflicting evidence, that task is not for a reviewing court. (See ibid.)

In addition, the positive RIA would have diffused or negated some of the rebuttal the prosecution did present. Evidence of petitioner's demeanor at the time of his arrest was offered because it was inconsistent with the claim of methamphetamine use. As noted, however, Pitts found it consistent with PCP intoxication. More significantly, petitioner would have been able to challenge, with contrary scientific evidence, the testimony of Bonnie Driver that she determined PCP was not present in the blood sample. Nor could the prosecutor have argued strenuously and without contradiction, "So what independent evidence do you have of drug use in this defendant? Independent evidence of drug use this night. You have none. In fact, the only independent evidence of drug use on this night is none. Blood, no drugs in the blood. Conduct? No conduct consistent." The prosecutor used the GC/MS to make negative reference to Sharma's testimony "that long after the ingestion of . . . PCP you can determine its presence. [P] The fact which exists in this particular case is that we don't have those--no evidence of those being in the defendant's blood." He also questioned Sharma's opinion as to petitioner's diminished capacity in light of the negative results. (Cf. Kyles, supra, 514 U.S. at p. 444.) As in Kyles, "because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested." (Id. at p. 429.)

At this juncture, we must keep in mind petitioner does not have to establish his defense would have ultimately succeeded. (Kyles, supra, 514 U.S. at p. 434.) We must also factor other considerations into the materiality equation: Diminished capacity "only needs to be established sufficiently to create a reasonable doubt of

the defendant's guilt when taken into consideration with all the evidence in the case." (People v. Wells (1938) 10 Cal. 2d 610, 622, 76 P.2d 493.) Moreover, petitioner did not seek to avoid guilt entirely but only to negate premeditation and deliberation. At trial, his mental state was the only truly contested issue, which the jury deliberated for a day and a half, even without independent scientific evidence of intoxication.

On this record, we conclude the positive RIA finding was material within the meaning of Brady, supra, 373 U.S. 83. Its nondisclosure prevented petitioner from presenting a credible defense of diminished capacity, thereby denying him a fair trial. As outlined above, this "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Kyles, supra, 514 U.S. at p. 435, fn. omitted; see Bagley, supra, 473 U.S. at p. 678.)

III. DISPOSITION

Although we conclude the prosecution failed to disclose exculpatory evidence, we further determine the materiality of that evidence is limited to petitioner's capacity to premeditate and deliberate; and petitioner does not argue otherwise. He is thus entitled to relief only with respect to the first degree murder conviction, special circumstance finding, and death penalty.

The petition for writ of habeas corpus is granted. The judgment of conviction is vacated, and petitioner is remanded to the Superior Court of Orange County. Upon finality of this decision, the clerk shall remit a certified copy of this opinion to the superior court for filing, and respondent shall serve another copy thereof on the prosecuting attorney in conformity with Penal Code section 1382, subdivision (a)(2). If the People do not elect

to bring petitioner to trial within 60 days after service pursuant to Penal Code section 1382, subdivision (a)(2), the trial court shall enter judgment reflecting a conviction for second degree murder and shall sentence petitioner accordingly. (See Pen. Code, @ 1484; In re Bower (1985) 38 Cal. 3d 865, 880, 215 Cal. Rptr. 267, 700 P.2d 1269.)

BROWN, J.

WE CONCUR:

MOSK, J.

WERDEGAR, J.

CROSBY, J.*

*Honorable Thomas F. Crosby, Associate Justice, Court of Appeal, Fourth District, Division 3, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISSENTING OPINION BY KENNARD, J.

DISSENT BY: KENNARD

DISSENT: DISSENTING OPINION BY KENNARD, J.

In 1980, petitioner opened fire on a group of police officers who were trying to arrest him in a crowded bar, killing one officer, seriously wounding two others, and wounding two of the bar's patrons. At trial, he asserted a defense of diminished capacity, claiming that he was under the influence of amphetamines when he began shooting and therefore acted without premeditation and deliberation or malice. He was convicted of capital murder and sentenced to death. He then filed a petition for writ

of habeas corpus, contending that the prosecution had breached its duty to provide him with material, exculpatory evidence when it failed to disclose to his attorneys that a preliminary screening of a sample of petitioner's blood taken shortly after his arrest showed that petitioner might have had a different drug, phencyclidine (hereafter PCP), in his bloodstream. A majority of this court agrees with his contention. I do not.

In my view, the evidence at the proceedings on habeas corpus, held well over a decade after the trial when memories of the events in question had faded, is inconclusive as to whether the prosecution failed to provide the defense with the test result in question. Thus, petitioner has not met his "heavy burden" (People v. Duvall (1995) 9 Cal. 4th 464, 474, 886 P.2d 1252) of proving that the prosecution violated his right to due process by failing to disclose the result. Far more important, however, it is inconceivable that the result of this highly unreliable preliminary screening could have altered the outcome of petitioner's trial. There was no evidence that petitioner was under the influence of PCP when he killed Officer Reed, apart from his own self-serving statement that he had used the drug in the past; and he made no pretense of having used it in the days leading up to the shooting. As a result, the test result in question was not "material," and therefore did not trigger the prosecution's duty to disclose "material" exculpatory evidence.

I

The testimony at the guilt phase of petitioner's trial is accurately summarized in this court's opinion affirming petitioner's conviction on appeal:

"In June 1980 defendant was a wanted man; he had failed to appear for a jury trial and another criminal hearing, and two bench warrants were issued for his arrest. After telling his former live-in girlfriend he was not going back to jail and did not want to die in prison, defendant bought a gun and changed his name to Gordon Mink.

"Meanwhile the Garden Grove police were looking for him. At an evening prepatrol briefing on Saturday, June 7, the police department distributed a flier to all officers. The flier contained defendant's name, photograph, and description; it noted there were outstanding warrants for his arrest, described his car, and listed the address where the car was last seen.

"Shortly thereafter, Officer McInerny and his partner, Reserve Officer Henninger, found the described car at an apartment complex. They watched it from their marked patrol car for about 45 minutes before they left to handle other pressing calls. While investigating another incident about 11 o'clock later that night, the two officers again noticed defendant's car -- this time at the Cripple Creek Bar.

"They called for assistance, and Garden Grove Officers Reed and Overly quickly arrived. After discussing the flier distributed earlier that evening, all four officers -- all in full uniform -- entered the crowded bar through two separate doors and worked their way to the center of the room.

"Defendant, who was sitting in the corner with a group of other 'motorcycle-type people,' saw the officers enter; a nearby patron heard him [curse and] say 'the pigs are here,' as he started for the door. The officers recognized defendant and moved in his direction. At the

door, Officer Reed caught up with defendant and put his hand on defendant's shoulder. Before any of the officers could draw his weapon, defendant pulled a gun and fired at least eight times. Two lethal shots hit Officer Reed; three shots gravely wounded Officer Overly; Officer Henninger was seriously wounded; a private citizen, Terezia, suffered permanent and grave injury after being shot between the eyes; and another citizen, McKinney, was shot in the leg.

"Defendant fled and hid in some bushes outside the bar. About two hours later, with numerous officers at the scene, he was found crouched in the dirt. As he was brought out of the bushes an officer called out, 'Where's the gun?' Defendant stated, 'I threw it.' His gun, hat and keys were thereafter found nearby.

"....

"Defendant testified in his defense and presented expert witnesses who suggested he may have suffered from diminished capacity because of drug abuse at the time of the incident. Defendant admitted he had suffered a 1970 felony conviction in Florida for 'burglary.' He detailed his extensive drug abuse history and claimed to have been under the influence of methamphetamines on the night in question and that he remembered nothing of the events in question. In rebuttal, the People established that defendant's blood sample, taken shortly after his arrest, showed no presence of drugs and specifically, the test for methamphetamine was negative. Moreover, numerous officers who dealt with defendant in the four to five hours after his arrest testified that although he 'stank like a pig' he behaved normally and did not appear to be under the influence of any drug." (People v. Brown (1988) 46 Cal. 3d 432, 440-441, 250 Cal. Rptr. 604, 758 P.2d 1135.)

At trial, petitioner testified that he had used PCP and many other drugs on previous occasions, but the only drug he claimed to have taken in the days leading up to the shooting was methamphetamine. Dr. Kaushal Sharma, a psychiatrist testifying for the defense, asserted that petitioner's previous use of PCP could have affected him at the time he killed Officer Reed even though he had not used the drug at or near the time of the shooting. Dr. Sharma explained that this could occur because PCP is stored in the fatty tissues of the body and may reenter the bloodstream long after the user first took the drug, producing "flashbacks."

According to Dr. Sharma, some people act in a bizarre or violent manner when under the influence of PCP, while others can take the drug without showing any outward symptoms. A PCP user's behavior during a flashback depends on "what they were acting like when they took the initial PCP": users who initially acted in a "strange" manner would generally exhibit similar behavior during a flashback, while those whose actions were normal when initially taking the drug would act similarly during a flashback. Petitioner had told Dr. Sharma that when he took PCP he sometimes had "strange thoughts" or "acted in a strange manner" but he "had not had any bad trips on PCP."

The jury found petitioner guilty of murdering Officer Reed (Pen. Code, @ 187) and found true a special circumstance allegation that he intentionally killed a peace officer engaged in the performance of his duties (id., @ 190.2, subd. (a)(7)). At the penalty phase, the jury imposed a sentence of death.

In his petition for writ of habeas corpus, petitioner alleged that law enforcement authorities had performed two tests on his blood sample: (1) a gas chromatography

mass spectrometer (GC/MS) test, which detected no drugs and was introduced against petitioner at his trial, and (2) a radioactive immunoassay (RIA) screening of his blood, which was positive for PCP but was never disclosed to the defense. Petitioner contended that by failing to disclose the latter result, the prosecution violated his right to due process of law, which imposes on the prosecution an "affirmative duty to disclose evidence favorable to a defendant," even in the absence of a specific request. (Kyles v. Whitley (1995) 514 U.S. 419, 432, 131 L. Ed. 2d 490, 115 S. Ct. 1555; see also United States v. Bagley (1985) 473 U.S. 667, 683, 87 L. Ed. 2d 481, 105 S. Ct. 3375; Brady v. Maryland (1963) 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194.) We issued an order to show cause and an order of reference, directing the referee to determine whether the prosecution disclosed the RIA test result to the defense, and whether the GC/MS and RIA test results could be reconciled.

The referee (Judge Daniel J. Didier of the Orange County Superior Court) concluded that the prosecution had disclosed the RIA test result to the defense. He also found that the difference in the GC/MS and RIA results was attributable to the unreliability of the RIA test, which often reported the presence of PCP in blood samples in which no PCP was present.

The majority rejects each of these findings. It concludes that the prosecution failed to provide the RIA test result to the defense, and that the inconsistent test results, while possibly attributable to the limitations of the RIA test, may also have been attributable to other factors that would be consistent with the hypothesis that petitioner was under the influence of PCP when he killed Officer Reed. Finally, it concludes that the undisclosed test result was "material"; that is, the result "could reasonably be taken to put the whole case in such a

different light as to undermine confidence in the verdict" (Kyles v. Whitley, supra, 514 U.S. at p. 435, fn. omitted), and that therefore petitioner's conviction and death sentence must be vacated.

The majority is wrong in rejecting the referee's finding that the prosecution did disclose the RIA test result to the defense. Moreover, although I agree with the majority that there are several possible explanations for the inconsistency between the RIA and GC/MS test results, I conclude that the RIA test was not "material," because it could not possibly have affected the outcome of petitioner's trial.

II

The first question we asked the referee to determine was this: "Did the prosecution disclose the positive PCP finding to petitioner, his investigator, or his counsel before or during trial?" The referee found it "very difficult" to give a yes or no answer, because more than a decade had passed since the trial. There was strong circumstantial evidence that the prosecution had disclosed the test result to the defense, but there was equally strong circumstantial evidence that the result had not been disclosed. After weighing the conflicting evidence, the referee found that the prosecution had disclosed the test's positive PCP result to the defense.

It is undisputed that the Orange County Sheriff-Coroner Department, Forensic Science Services (hereafter the crime lab) performed GC/MS and RIA tests of petitioner's blood sample, and that the former test was negative for PCP and several other controlled substances while the latter test was positive for PCP. The crime lab prepared a detailed "worksheet" that recorded the results of both tests; the lab's "result sheet," however,

indicated only that PCP was "not detected" in petitioner's blood sample. Although no witness expressly explained why the result sheet did not mention the positive RIA test, it appears to have been omitted because crime lab scientists believed that negative RIA test results were reliable but positive results were not, and they used the RIA test as a preliminary screening mechanism to determine whether they needed to perform the more accurate GC/MS test. In 1980, when the testing occurred, the crime lab's policy in criminal cases was to send copies of the result sheet to the prosecutor and defense counsel, but to send a copy of the worksheet to either attorney only upon request. Disclosure of the worksheet required the approval of a supervising criminalist.

The record before this court contains no evidence that the crime lab furnished the Orange County district attorney's office with a copy of the worksheet, which showed the positive RIA test, nor does it indicate that anyone in that office ever learned of the result of the RIA test. Prosecutors, however, have a duty to disclose not only material, exculpatory evidence actually known by the attorney prosecuting the case, but also evidence known to the investigating agencies acting on the prosecutor's behalf. (Kyles v. Whitley, supra, 514 U.S. at p. 440.) Thus, the prosecution in this case was obligated to disclose any material, exculpatory evidence possessed by the crime lab, a county agency that was analyzing the blood tests for the District Attorney's office. The crucial inquiry therefore is whether the crime lab ever disclosed the RIA test result to petitioner or his attorneys.

Deputy Public Defender Michael Beecher (now an Orange County Municipal Court Judge) initially represented petitioner following his arrest on June 8, 1980. In November 1980, petitioner elected to represent himself, and he handled the pretrial proceedings the year

thereafter, while Beecher provided assistance as "backup" or "advisory" counsel. In November 1981, the trial court appointed private attorney Daye Shinn to represent petitioner, and Shinn continued to represent petitioner throughout the balance of the proceedings in the trial court. There is no evidence that the crime lab ever provided a copy of the worksheet to petitioner, Defense Attorney Shinn, or Shinn's investigator, or that anyone ever informed any of them of the worksheet's existence. Whether the crime lab furnished the worksheet to Attorney Beecher, however, was a hotly contested issue at the reference hearing.

Deputy Public Defender Beecher's file notes show that on October 16, 1980, he telephoned Mary Graves, a supervising criminalist at the crime lab, and asked for reports on petitioner's blood testing, and that Graves told him she would send a report. But his file, which was retained by the public defender's office after it ceased to represent petitioner, contains only the result sheet, not the worksheet on which the PCP-positive RIA test result was recorded.[1] Beecher testified at the reference hearing that he did not recall receiving the worksheet, and that his notes made no mention of the worksheet. Had he seen it, he said, he would have regarded the worksheet's information as "very significant," would have noted it in his file, and would have consulted with a PCP expert.

Because the reference hearing was held 16 years after the crime lab's testing of petitioner's blood sample, it was not surprising that no one at the crime lab had any recollection of sending the worksheet of petitioner's blood test to defense attorney Beecher. But the bottom of the

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1. Witnesses testified that Beecher kept meticulous records, making it unlikely that he would have misplaced the test result outside of the file.

worksheet carried this notation: "Bercher [sic], Pub. Def. B-100 10-16-80." Frank Fitzpatrick, the chief criminalist in charge of managing the crime lab's clerical staff in October 1980, testified that this notation meant that on October 16, 1980, the lab sent copies of both the result sheet, which contained only the lab's ultimate finding that PCP was "not detected," and the more detailed worksheet, which noted that the preliminary RIA test was positive for PCP, to Attorney Beecher at his office in room B-100 of the Orange County Courthouse.

The referee found the notation on the worksheet, mentioned above, to be persuasive evidence that the prosecution had sent a copy of the worksheet to Beecher, but also found Beecher's testimony persuasive evidence to the contrary. It resolved this conflict in favor of the prosecution.

In the view of the majority, however, the referee did not find that the prosecution had provided the worksheet to the defense. The majority states that the referee's findings "do not accurately respond to the specific question posed in our reference order -- did the prosecution disclose the RIA result to petitioner or anyone acting on his behalf?" (Maj. opn., ante, 1998 Cal. LEXIS 1684 at p. *6-7, italics in original.) On the contrary, the referee's finding is explicit: "The evidence preponderates that . . . the positive RIA finding, was . . . disclosed and duly forwarded to defense counsel before trial, as requested." The only aspect of this finding that could conceivably be viewed as unresponsive is its failure to specify who had disclosed to the defense the worksheet indicating the positive RIA finding. The majority apparently considers this a fatal flaw, pointing out that the prosecuting attorney "had no knowledge of the worksheet and thus could not have disclosed it." (Ibid.) Thus, the majority concludes, it need not determine whether the

crime lab had furnished the test result to the defense, because the "prosecution" -- by which the majority presumably means the district attorney's office -- did not do so. (Ibid.)

The majority is wrong. As the majority itself acknowledges, courts have consistently " 'declined "to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."' " (Maj. opn., ante, 1998 Cal. LEXIS 1684 at p. 8, quoting United States v. Auten (5th Cir. 1980) 632 F.2d 478, 481.) Here, the Orange County District Attorney's office and the Orange County Sheriff-Coroner Department's crime lab, the agencies involved here, worked on the same side, that of the prosecution. In short, they were the prosecution's team. Therefore, so long as disclosure of material evidence was made to the defense by any part of that team, whether by a member of the district attorney's office or a member of the crime lab, the prosecution had done its duty.

The majority apparently also concludes that the referee found that the defense never received the worksheet. (Maj. opn., ante, at p. 4.) Although the referee's report on this issue is somewhat unclear, in my view he made no such finding. Rather, the referee found that there was "credible" circumstantial evidence that the worksheet had not been disclosed to the defense, but he also found credible circumstantial evidence of such disclosure. The referee resolved the conflict adversely to petitioner, who had the burden of proof.[2/]

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2. This is what the referee said on this issue: "Question one ['Did the prosecution disclose the Positive PCP finding to petitioner, his investigator, or his counsel before or during trial?'] is very difficult to answer yes or no. A reasonable inference can be drawn, from both the

The referee's resolution was proper. As this court has explained: "Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them. 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and the sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.' " (People v. Duvall (1995) 9 Cal. 4th 464, 474, 886 P.2d 1252, original italics.)

This court gives great weight to a referee's findings of fact when they are supported by substantial evidence, because the referee had the opportunity to observe the demeanor of witnesses and their manner of testifying. (In

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testimony, and the documentary evidence, that copies of both the final results (ex. 1) and the worksheet (ex. 2) were duly forwarded to Public Defender Beecher, as requested. Procedures for obtaining a worksheet were for a requesting attorney to talk to a supervisor, which Beecher did. Notations were to be placed on the documents as to destination, which was done here. The evidence is also credible that Beecher, as well as his successor counsel, were unaware of the existence of the worksheet, thus a reasonable inference that it was not received. The evidence is credible that the District Attorney's office was not aware of the worksheet, or of the positive RIA finding, and that if any exculpatory evidence had been available, either by the RIA worksheet, or otherwise, that it would have, as a matter of course, been released to defense counsel. There was no evidence that exhibit 2, or any other documentation, was concealed or withheld from either the district attorney or defense attorneys, by the crime lab, to that any police agency or the District Attorney withheld or concealed information. While testimony as to all witnesses on this issue is deemed credible, the evidence preponderates that the documentation, including the positive RIA finding, was freely available, disclosed and duly forwarded to defense counsel before trial, as requested. The answer to question one is yes."

re Marquez (1992) 1 Cal. 4th 584, 603, 822 P.2d 435.) Curiously, in reaching its conclusions, the majority makes no mention of this well-established standard of review. Here, the evidence at the reference hearing was inconclusive. According the referee's findings the weight they are due, I conclude that petitioner did not meet his heavy burden of establishing that the prosecution failed to disclose to the defense the RIA test result indicating the presence of PCP in petitioner's blood sample.

III

The second question we asked the referee to resolve was this: "Did the positive PCP finding from the RIA test indicate that there was PCP or a PCP analog in petitioner's blood at the time of the crimes? If so, did the subsequent negative PCP finding from the GC/MS test establish that there was no PCP or PCP analog in petitioner's blood at the time of the crime? How can the results of the two tests be reconciled?"

The referee found that (1) the RIA test's positive PCP finding did not indicate that there was PCP or a PCP analog in petitioner's blood; (2) the subsequent negative finding by the GC/MS test established that there was no PCP or PCP analog in petitioner's blood; and (3) the conflicting results of the two tests could be "reconciled" by treating the RIA test result as incorrect.

The referee's finding that the GC/MS test was right and the RIA test was wrong is, according to the majority, but one explanation for the discrepancy between the two tests. There are other explanations for the discrepancy, the majority notes, that leave open the possibility that the RIA test result was correct. I agree with the majority that it is possible, albeit unlikely, that the RIA test result was accurate.

The most persuasive evidence regarding the reliability of the RIA test was offered by Dr. Vina Spiehler, a noted forensic toxicologist whose expert testimony was credited by the referee. Dr. Spiehler is a former president of the Society of Forensic Toxicologists and the California Association of Toxicologists, a former editor of the Toxicology Division Newsletter of the American Academy of Forensic Sciences, and the author of numerous published studies analyzing the reliability of RIA testing for PCP and other illegal drugs. She was also quite familiar with the procedures at the crime lab where petitioner's blood sample was tested, having worked there from 1981 (the year after the sample was tested) to 1986.

Dr. Spiehler explained that in 1980 the RIA test was used as a preliminary screen because its negative findings were considered reliable, but its positive findings were not. In other words, if the RIA test found no PCP in a blood sample, then the chances were high that the finding was accurate. But if, as in this case, the RIA test indicated that there was PCP in a suspect's blood, the result was not reliable, thus necessitating further tests to determine whether PCP was actually present.

Based on studies she and other scientists had performed on the accuracy of the RIA test, Dr. Spiehler concluded that if an RIA test of the type used in 1980 produced a positive result for PCP, there was only a 37 percent probability that the tested blood actually contained PCP. Thus, Dr. Spiehler stated, petitioner's positive RIA test result meant only that there was about one chance in three that petitioner's blood actually contained PCP.

At the reference hearing, petitioner argued there were two possible explanations for the conflicting RIA and GC/MS test results that would be consistent with his claim

that he had PCP or a PCP analog in his bloodstream at the time of the shooting. Although the evidence did not conclusively exclude either of these possibilities, neither of them was very likely, as I shall explain.

Petitioner's expert, Dr. Ferris Pitts, pointed out that the crime lab had used the GC/MS test to test petitioner's blood sample only for PCP, not for any PCP analog. A PCP analog, Dr. Pitts explained, is a substance similar but not identical to PCP, which produced the same psychotropic effects as PCP. Such an analog, he testified, might register a positive result on the RIA test, but a negative result on the GC/MS test, which is more precise.[3]

Dr. Spiehler, the prosecution's expert, acknowledged that the GC/MS test might not detect a PCP analog. But she added that most such analogs are chemically so similar to PCP that the GC/MS test would indicate their presence, even if it did not register a positive result. After examining petitioner's GC/MS test, Dr. Spiehler found no indication that such analogs were present in petitioner's blood sample. Her testimony was corroborated by Dr. Robert Cravey, a former Chief Forensic Toxicologist for the Orange County Sheriff-Coroner's Department. Petitioner offered no evidence that any PCP analog whose chemical structure was so different from that of PCP that it would not show up on the GC/MS test was in use in Orange County during 1980.[4]

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3. The GC/MS test for PCP examines only three "channels" on the scale for evidence of the drug. If PCP is present, it will appear on all three channels. Evidence of other drugs chemically related to PCP is likely to appear on one of the three channels, but not all three.

4. Petitioner's expert, Dr. Ferris Pitts, testified that a PCP analog, "4-methyl PCP," is "found on the street and used by individuals." He said that evidence of this analog would appear on a GC/MS test for

Petitioner also asserts that the RIA test can detect smaller concentrations of PCP in a blood sample than the GC/MS test. Thus, he argues, he may have had a quantity of PCP in his blood sample great enough to have affected his thinking and to be detected by the RIA test, but too minute to be detected by the GC/MS test.

The GC/MS test that was run on petitioner's blood sample had the capability of detecting the presence of as little as 25 nanograms per milliliter of PCP in the blood and might have been able to detect as little as 10 nanograms per milliliter. Because certain printouts relating to the GC/MS test run on petitioner's blood have been lost or destroyed, it is no longer possible to determine whether that test could have detected quantities between 10 and 25 nanograms per milliliter.

On the other hand, the RIA test could, according to the manufacturer, detect 50 to 70 nanograms of PCP per milliliter of blood and thus could not detect concentrations as small as those that could be found using the GC/MS test. But petitioner's expert, Dr. Pitts, gave uncontradicted testimony that at the time petitioner's blood sample was tested almost all laboratories were able to refine the RIA test so that it could measure smaller quantities of PCP. Dr. Pitts said that in 1980 the RIA test could "regularly" detect as little as 10 nanograms of PCP per milliliter of blood and on occasion even as little as 1 or 2 nanograms

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PCP, because 4-methyl PCP, like PCP itself, would have a "mass point" at about 200 on the scale used to measure the results of the GC/MS test. On direct examination, he claimed that petitioner's GC/MS test appeared to show a mass point at about 200. On cross-examination, however, he admitted that he saw only "a little bit of" a mass point, and that he "would have to do a lot more work to be sure what it was." The prosecution's experts, Dr. Spiehler and Dr. Cravey, testified that there was no such mass point in the results of petitioner's GC/MS test.

per milliliter. It is therefore possible that petitioner had a very small quantity of PCP in his blood when tested, and that this tiny quantity was detected by the RIA test but not by the GC/MS test.

It is not at all clear, however, that concentrations of PCP too small to be detected by the GC/MS test can nonetheless have a pharmacological effect. The prosecution's expert, Dr. Spiehler, testified that the American Association of Clinical Chemistry has found that the drug has such an effect only in concentrations greater than 75 nanograms per milliliter of blood. She added that the most "liberal" scientific organizations have taken the position that such effects can be found in concentrations as small as 7 nanograms per milliliter. As I noted earlier, Dr. Pitts, the defense expert, testified that even smaller quantities of PCP can cause a pharmacological effect. The referee, however, found Dr. Spiehler's testimony to be more credible than that of Dr. Pitts.

In summary, it is possible that petitioner was under the influence of a PCP analog that was detectable by the RIA test, but which was chemically so different from PCP that it would not appear on the GC/MS test. But because there is no evidence that any such analogs were available in Orange County in 1980, the likelihood of this possibility is slight. Similarly, it is possible that the RIA test that was conducted here may have been capable of detecting concentrations of PCP in petitioner's bloodstream smaller than those measured by the GC/MS test, and it is possible that those small concentrations could have had a pharmacological effect on petitioner at the time of the shooting. But the likelihood that petitioner's blood sample had a quantity of PCP too small to be detectable by the GC/MS test, yet large enough to significantly affect his behavior, is not great. Far more likely is the referee's conclusion that the RIA test's positive result for PCP was

simply an inaccurate "false positive," which Dr. Spiehler found to be true of most PCP-positive RIA test results. These matters are significant to the resolution of the final question this court must address: whether any failure by the prosecution to disclose the result of the RIA test was material.

IV

A prosecutor's failure to disclose exculpatory evidence to a criminal defendant before trial does not by itself require that the defendant's conviction be overturned. Reversal is required only if the undisclosed exculpatory evidence was "material." (Kyles v. Whitley, supra, 514 U.S. at p. 434.) Evidence is "material" if there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been disclosed, which occurs when the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Id. at pp. 434-435, fn. omitted.) If the undisclosed evidence is "material," the defendant's conviction must be vacated without a separate harmless-error review, because the prejudice determination is subsumed within the definition of the term "material." (Id. at pp. 435-436.)

The majority concludes that the prosecution's alleged failure to disclose the result of the RIA test was "material" within this definition, requiring that his murder conviction be vacated. I disagree.

If the defense had attempted to introduce evidence of the positive RIA test result, it is unclear whether the test result would have been admissible. To justify the test result's admission, petitioner would have to satisfy the long-established requirements for the admission of scientific tests commonly known as the Kelly/Frye rule.

(People v. Kelly (1976) 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1240; Frye v. United States (D.C. Cir. 1923) 54 App. D.C. 46, 293 F. 1013.) In People v. Diaz (1992) 3 Cal. 4th 495, 526, 834 P.2d 1171, this court summarized this rule as follows: "Under the Kelly/Frye rule, evidence based on a new scientific method of proof must satisfy three requirements before it may be admitted. First, the party offering the evidence must show that the technique is '"sufficiently established to have gained general acceptance in the particular field in which it belongs."' [Citations.] Second, the proponent of the evidence must establish that 'the witness furnishing such testimony' is 'properly qualified as an expert to give [such] an opinion . . . .' [Citation.] Third, the proponent must demonstrate that 'correct scientific procedures were used in the particular case.' [Citations.]"

It is uncertain whether petitioner could have shown that a PCP-positive RIA test result, as occurred here, was generally accepted by the scientific community as an accurate indicator of the presence of PCP. Although several published decisions have upheld the admission of the results of RIA analysis of human hair as evidence of cocaine use (see Nevada Employment Security Department v. Holmes (Nev. 1996) 112 Nev. 275, 914 P.2d 611; Adoption of Baby Boy L. (N.Y.Fam.Ct. 1993) 157 Misc. 2d 353, 596 N.Y.S.2d 997), to my knowledge, no published decision has ever held that the results of RIA blood tests (either positive or negative) for any drug are sufficiently accepted by the scientific community to be admissible in court. According to the prosecution's expert, Dr. Spiehler, the Food and Drug Administration requires all manufacturers of RIA testing kits to state that a positive finding must be confirmed by a GC/MS test before being reported, and this requirement is echoed in the guidelines of the American Academy of Forensic Scientists and the Society of Forensic Toxicologists. Thus,

the scientific community apparently does not view an unconfirmed positive RIA test as a reliable indicator of drug intoxication.[5]

Assuming for the sake of argument that petitioner could have successfully introduced the RIA test result into evidence, he would have had to overcome an even more formidable hurdle: persuading the jury that (1) he was under the influence of PCP when he killed Officer Reed, and (2) that as a result of the PCP intoxication he lacked premeditation and deliberation or malice. In 1982, when petitioner's trial took place, the task of convincing a jury of the merits of a diminished capacity claim was difficult in the best of circumstances; as one court explained, "juries take a notoriously dim view of the diminished capacity concept although appellate courts seem to love to

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5. I disagree with the majority's assertion, which is unsupported by any citation of authority, that the Attorney General "waived" the argument that the RIA test results would have been inadmissible. (Maj. opn., ante, at p. 19, fn. 12.) Petitioner has the burden of demonstrating a reasonable probability that disclosure of the RIA test would have altered the outcome of his trial, and the Attorney General has properly asserted that petitioner did not satisfy that requirement. Contrary to the majority's assertion, the Attorney General's failure to mention the Kelly/Frye test in explaining why that burden has not been met does not prevent this court from relying on the test as a basis for denying the petition for habeas corpus.

The majority also contends that whether the RIA test would have been admissible is "largely beside the point" because the defense could have had the blood sample retested for PCP and "possibly" obtained admissible confirmation of the positive result with a GC/MS test. (Maj. opn., ante, at p. 19, fn. 12.) There is no evidence whatever in the record to support the majority's speculation that such a test would have verified the RIA test result. Moreover, the record reflects that the prosecution provided the defense with a portion of the blood sample for testing before trial; thus, the prosecution's alleged failure to disclose the RIA test result did not deny petitioner the opportunity to conduct such a test.

explore it in the most erudite manner . . . ." (People v. Huffman (1977) 71 Cal. App. 3d 63, 76, 139 Cal. Rptr. 264.)[6] Here, there was overwhelming evidence showing either that PCP was not in petitioner's bloodstream when he killed Officer Reed, or that if it was, it did not significantly affect petitioner's mental state at the time of the killing. Given this evidence, it is highly unlikely that petitioner would have been successful in persuading the jury that he suffered from diminished capacity caused by PCP intoxication.

Petitioner offered no evidence at trial that his behavior before and after he killed Officer Reed was bizarre or irrational; to the contrary, his conduct appeared goal-directed and rational. Petitioner knew there was a warrant for his arrest; he had changed his name, bought a gun, and told his girlfriend that he did not want to return to prison. When police officers entered the bar on the night of the killing, petitioner said, "Fuck, the pigs are here," and tried to leave. When one of the officers attempted to detain him, petitioner opened fire, killing one officer and wounding two others. He had sufficient presence of mind to flee, to hide in the bushes, and to dispose of the murder weapon and a hat that might have helped to identify him. When arrested two hours later, he behaved normally and gave no indication that he was under the influence of any drug. The pupils of his eyes were dilated, which is a symptom of methamphetamine use. PCP, by contrast, causes nystagmus (rapidly bouncing pupils) and causes the pupils to contract. (People v. Bonillas (1989) 48 Cal. 3d 757, 782, 257 Cal. Rptr. 895, 771 P.2d 844; People v. Dunkel (1977) 71 Cal. App. 3d

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6. In June 1982, two weeks after petitioner's trial, California voters overwhelmingly approved Proposition 8, a voter initiative that, among other things, abolished the diminished capacity defense. (See People v. Saille (1991) 54 Cal. 3d 1103, 1112, 820 P.2d 588.)

928, 932-933, 139 Cal. Rptr. 685.) There is no evidence that petitioner displayed these PCP symptoms. Moreover, petitioner testified that he used methamphetamine, not PCP, on the day he killed Officer Reed.

The majority speculates that petitioner may have had a PCP flashback when he killed Officer Reed. It points out that at petitioner's trial a forensic psychiatrist, Dr. Kaushal Sharma, testified that PCP becomes attached to the fatty tissue in the user's brain and may be released into the user's system long after it was originally ingested, causing such flashbacks to occur. Thus, the majority asserts, petitioner's use of PCP long before he killed Officer Reed could have caused him to be under the influence of PCP at the time of the killing. But Dr. Sharma testified that persons having such flashbacks ordinarily behave in the same manner in which they acted when they initially took the drug. Because petitioner admitted to Dr. Sharma that he "had not had any bad trips on PCP," it is unlikely that a PCP flashback would have caused his violent behavior at the time of the shooting. Furthermore, there is no evidence that petitioner's behavior before the officers entered the Cripple Creek Bar was unusual or violent, and the possibility that he conveniently had a flashback at the precise moment they entered the bar is farfetched.

In short, the most reliable scientific evidence (the GC/MS test) showed that petitioner was not under the influence of PCP when he shot and killed Officer Reed, his behavior at the time of the killing was not suggestive of PCP intoxication, and in his own testimony he made no claim of using PCP in the hours or days immediately preceding the shooting. Given this evidence, the RIA test result showing that PCP was possibly present in petitioner's blood sample could not have altered the outcome of his trial. It therefore did not fall within the

scope of the prosecution's duty to disclose material evidence.

For the reasons set forth above, I would deny the petition for writ of habeas corpus.

KENNARD, J.

WE CONCUR:

BAXTER, J.

CHIN, J.

APPENDIX C

APPENDIX C

In re **JOHN GEORGE BROWN** on Habeas Corpus

S037992

SUPREME COURT OF CALIFORNIA

1998 Cal. LEXIS 3196

Decided: May 20, 1998

JUDGES: Kennard, J., Baxter, J., and Chin, J., are of the opinion the petition should be granted. George, C.J., did not participate. Hon. Thomas F. Crosby, Associate Justice, Court of Appeal, Fourth Appellate District, Division Three, assigned by the acting Chief Justice, pursuant to article VI, section 6, of the California Constitution, participated.

OPINION: Petition for rehearing DENIED.

George, C.J., did not participate.

Hon. Thomas F. Crosby, Associate Justice, Court of Appeal, Fourth Appellate District, Division Three, assigned by the acting Chief Justice, pursuant to article VI, section 6, of the California Constitution, participated.

Kennard, J., Baxter, J., and Chin, J., are of the opinion the petition should be granted.